IN THE SUPREME COURT
OF THE
STATE OF VERMONT

Stan Baker, et al.

v.

State of Vermont, et al.

SUPREME COURT DOCKET NO. 98-32

Appeal to the Supreme Court
from the
Chittenden County Superior Court
Docket No. S 1009-97 CnC

BRIEF OF *AMICUS CURIAE*

--TAKE IT TO THE PEOPLE--

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III. STATEMENT OF INTEREST OF *AMICUS CURIAE* TAKE IT TO THE PEOPLE

Take It to the People ("TIP") is an association of Vermont citizens who believe that changes in the definition of marriage such as those sought by the Appellants can only be made by the General Assembly. Fundamental reorganizations of society must have their origins in political rather than judicial action. Drastic changes in state regulation of basic social institutions such as marriage must be made with the consent of the governed. TIP believes that this Court has not been authorized by the People to make such changes to their marriage law. Nevertheless, Appellants urge this Court to adopt and apply a form of judicial analysis which will free it of any obligation to rule in accordance with the will of the People, thus undermining our democracy. For these reasons, TIP submits this *amicus* brief and urges this Court to hold that Vermont's marriage registration law does not permit state recognition of same-sex unions and that that law does not violate Vermont's Constitution.

IV. ARGUMENT

Introduction

Appellants challenge Vermont's marriage registration law, arguing that it must encompass their homosexual unions or be held unconstitutional. It is a bold assertion given that their position is totally unsupported by our Constitution, our laws, and our history. In fact, all of the evidence clearly supports a contrary conclusion. Our founders never intended the Constitution to protect such a right, our history shows that such a right was never part of our traditions, and the very definition of marriage renders Appellants' position oxymoronic. In other words, the textual, legal and historical analysis this Court has always relied on in interpreting the will of the people dooms Appellants' suit to failure. Appellants surely know this, yet seem to have proceeded with a very straight-forward legal challenge anyway. How can they hope to prevail?

They hope to prevail because they understand that appearances can be deceiving. For this is <u>not</u> a straight-forward challenge to Vermont's marriage law. Though couched in the familiar language of our Western liberal tradition, the analytical framework the Appellants actually urge this Court to adopt in granting them relief—indeed required to grant that relief—has extraordinarily dangerous implications for our constitutional democracy. This case involves far more than a traditional tug of war between legislative and judicial power. Rather, we believe that the entire discursive context in which the Appellants argue, and in which the state has been forced to offer its response, is inappropriate and deeply subversive both to the fundamental organizing principles of our society and to the political foundations on which our democracy rests. This brief highlights these areas.

First we will show that Appellants' argument runs counter to our law and history and thus cannot withstand the scrutiny of a traditional constitutional analysis. Then we will demonstrate that Appellants' arguments are not really part of our judicial traditions, but are actually based on radical "poststructural" literary theories. We will show how the importation of these doctrines into our jurisprudence would pose enormous dangers to the viability of our constitutional democracy. Finally we demonstrate that the Appellants' reliance on "societal changes" in arguing for the creation of new constitutional rights misinterprets the law and has serious public policy implications for legislative efforts to reform our statutes.

A. If Appellants Rely on Traditional Forms of Statutory and Constitutional Interpretation to Advance Their Cause--They Lose.

The gist of Appellants' equal protection claim is that men who wish to have intimate relationships with other men and women who wish to have intimate relationships with other women are similarly situated to men and women who wish to marry. Vermont law permits marriage only between women and men. Since the state cannot show a rational basis for this discrimination, its marriage law violates Vermont's Common Benefits Clause and is therefore unconstitutional.[1]

In determining whether a state law denies a right guaranteed by the Constitution's Common Benefits Clause, this Court will examine the historical and legal origins of that right. See Brigham v. State, 8 Vt. Law Week 41, 44 (11 February 1997) ("An understanding of the constitutional issue presented requires . . . a review of the specific historical and legal origins of the right . . . in Vermont."). Under such an analytical framework, Appellants' challenge to

[1] Appellants make three other major arguments. First, Appellants argue that Vermont law already permits granting marriage licenses to same-sex couples. This interpretation of the statutory text requires an act of such violent deconstruction that it would make even Jacques Derrida blush (see discussion, infra). The second argument is that the right of same-sex couples to have their relationships legally recognized by the state is fundamental. The third argument is that same-sex couples are a suspect class. Granting relief on these bases would, given the current state of our law, require an act of immense judicial imagination.

Vermont's marriage registration law faces insurmountable historical, legal, definitional, and textual hurdles. The ink was barely dry on Vermont's first constitution when the same men who drafted that document adopted statutes making sodomy a capital crime.[2] Clearly they did not believe that the fundamental principles contained in the Constitution encompassed the right of members of the same sex to have their unions recognized by the state. Criminal prohibitions against sodomy remained a part of our law until 1977. There is no historical support for Appellants' position and in fact any interpretation finding a right to state-recognized same-sex unions would run counter to every facet of the Vermont experience.

Neither is there evidence that early contract and natural law theorists would have supported such an interpretation. Jean-Jacques Rousseau, cited to by Amicus Vermont Human Rights Commission in support of a constitutional right of same-sex unions, was horrified by homosexuality.[3] John Locke, also cited by the Commission, was born a Puritan and was deeply committed to the principle that the Bible was a source of natural law and that God meant what he said.[4] He made clear that the Bible was not a plaything to be used in support of whatever theory happened to be au courant: "The prejudices of our own ill-grounded opinions, however by us called probable, cannot authorize us to understand Scripture contrary to the direct and plain meaning of the words."[5] Presumably his sentiments would apply to Leviticus 20:13. Given this record, and the prohibitions against homosexual behavior which existed during their lifetimes, it is ahistorical to argue that any of the philosophers or founders could have intended

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[2] Allen Soule, comp., Laws of the State of Vermont (Montpelier: Secretary of State, 1964), 12: 128 (1779).

[3] Jean-Jacques Rousseau, The Confessions, trans. J. M. Cohen (New York: Penguin, 1953), 71-73.

[4] Maurice Cranston, John Locke: A Biography (New York: Macmillan, 1957), 3. Locke believed that scripture was "a collection of writings designed by God for the instruction of the illiterate bulk of mankind in the way of salvation, and therefore generally and in necessary points to be understood in the plain direct meaning of the words and phrases." John Locke, The Reasonableness of Christianity, as delivered in the Scriptures (London, 1695), cited in John Locke: A Biography at 389.

[5] John Locke, The First Treatise on Government, chap. 4, para. 36,

their political philosophy to encompass the rights sought here.[6]

Marriage, the union of one man and one woman, is the most fundamental of our legal, cultural, and social institutions, and one of the most universally understood. Every case, statute, constitution, historical reference, and commentary ever written on the subject during one thousand years of Anglo-American history conceives of marriage as meaning only one thing. Reasonable minds really cannot differ on what is meant by the word "marriage."[7] Similarly, our current Constitution does not guarantee the right of men to marry men or women to marry women. There is no textual support for a right of state recognition of same sex unions. This is not to say that Vermonters could not change their laws or Constitution to guarantee the right. Rather we simply point out the obvious: as the facts stand no such creature currently exists and no constitutional right protects it.

For thirty years those challenging America's marriage laws ran up against these obvious textual and historical hurdles. They explain why no court (with very recent exceptions in Alaska and Hawaii) has ever recognized the rights Appellants now seek. Given this reality, how can Appellants get this Court to grant them the relief they desire?

In order to prevail, Appellants must convince this Court to accept a radical redefinition of marriage and equal protection. This is why Appellants must make the rather implausible argument that marriage is not the union of one man and one woman, but a union of any two people who have made a mutual commitment to one another. Appellants' Brief at 6. This is why Appellants redefine equal protection in such a way that any classification by the legislature which depends on shared cultural and social values for its justification becomes per se unconstitutional. Appellants understand that only by severing these terms from the legal,

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[6] Brief of Amicus Vermont Human Rights Commission at 2-4.

[7] We address the arguments of the self-described "Professors of Legislative and Statutory Interpretation" on this point, infra.

historical, cultural, and social contexts in which they were created can they hope to prevail. In short, they urge this Court to adopt a poststructural analytical framework and apply it to the question at hand. This would have grave consequences for our society and could seriously undermine constitutional mechanisms designed to work in a modern rather than a postmodern world.[8]

B. Though Couched in the Language of Traditional Liberal Rights Theory, Appellants' Challenge Actually Requires This Court to Adopt a Radical Poststructural Analysis.

1. What Do We Mean by Poststructuralism?

Poststructuralism is a general term used to describe a set of related theories of literary interpretation developed in the aftermath of World War II. Poststructural thought entered American culture in earnest through the nations' colleges and universities beginning in the 1970s and continues to be the dominant ideological force in the humanities and social sciences.[9] There are many strands of poststructuralism, but the starting point of all of them is the notion that language is central to the way in which humans view and understand their world. The definitions of that language are culturally and socially constructed. Thus, there is no objective reality, no objective right or wrong in the poststructural universe. Instead, our values are based on dominant societal definitions.

Given the central assumption of poststructuralism about the importance of language to perception, activists for social change versed in poststructural theory came to understand that

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[8] By the term "modern" we mean the intellectual tradition spawned by the Enlightenment and the Scientific Revolution. Our constitutional government draws its meaning and context from these origins and assumes a shared understanding of the terms and concepts which embody it. Postmodern thought, of which poststructuralism is an adjunct, denies the universal validity of the liberal and rational assumptions such as those which have traditionally given meaning to our constitutional democracy. Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at Century's End (New York: New York University Press, 1995), 1-6.

[9] A useful introduction to the terms and concepts discussed in this section is Michael Payne, ed., A Dictionary of Cultural and Critical Theory (Cambridge, Mass.: Blackwell, 1996).

society's working vocabulary (its "dominant discourse") tended to benefit (or "privilege") certain classes. Changing that vocabulary (i.e. subverting the dominant discourse) was thus no mere exercise in semantics, but was in fact a political act helping them achieve the ends they sought.[10]

Several poststructural approaches have been adopted by critics. Perhaps the best known is deconstruction—a theory most associated with Jacques Derrida and Paul de Man. The starting point for deconstructionists is that Western ways of writing rely on oppositional or binary expression in order to communicate ideas. For example, our definition of "man" relies on its opposition to "woman;" our definition of "white" relies on its twin "black" to give it meaning. And of course "straight" defines itself in opposition to "gay." Deconstruction theory asserts that, while language may appear to be objective, it in fact benefits (or "privileges") certain people, ideas and values over others. This is particularly the case when the classification is undertaken by those who hold power. Thus, one gay scholar argues that "'heterosexuality' has meaning only in relation to 'homosexuality'; the coherence of the former is built on the exclusion, repression, and repudiation of the latter."[11]

Deconstruction has been adopted by ideological critics of Western society. They see it as a way to escape the confines of the modern, western, rationalist, intellectual discursive

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[10] Thus, radical feminists have rejected liberal feminist attempts to gain equality within the framework of our current constitutional system. Catharine MacKinnon argues that feminist critiques of the legal system are impossible when situated within the discourse of that same system since its fundamental ideology is gendered male and is male dominated. "Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy." As a result, "the law sees and treats women the way men see and treat women." Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," Signs 8 (1983), 639, 644. Joan Hoff-Wilson applies a similar theoretical analysis to her work on women and the American legal system, Law, Gender, and Injustice: A Legal History of U.S. Women (New York: New York University Press, 1991).

[11] Steven Seidman, "Identity and Politics in 'Postmodern' Gay Culture," in Michael Warner, ed., Fear of a Queer Planet: Queer Politics and Social Theory (Minneapolis: University of Minnesota Press, 1993), 130-132.

model which they believe is responsible for their oppression.[12] Gay and lesbian scholars have also seen the value of poststructural thought (including deconstruction) to their critique of and challenge to heterosexual society. Legal theorists have adopted this "queer theory" and argued for its application to gay and lesbian legal actions. Thus, Stanford law professor Janet E. Halley has argued that "cultural criticism committed to the premise that cultural binarisms are pervasively textual should form an important theoretical resource for litigators . . . ."[13]

We can see an example of the rhetorical power of this theory in the creation and use of the term "same-sex marriage" which Appellants have used to such great effect in promoting the right of same-sex couples to gain legal recognition by the state. The noun "marriage" has a meaning in total opposition to the compound adjective "same-sex" which is used to modify it. This "de-centering" of a term (i.e. "marriage" now includes a set of relationships which obliterate its traditional definition) totally upends its meaning and creates a new discourse privileging a different set of values: to wit the "right" of homosexuals to "marry." The creation of such a radical incoherence is a hallmark of deconstructionist activism. This process is a subtle one. Once the definitional ground has been shifted, one finds it difficult to argue against the newly-privileged position. Often, one cannot even explain why. Thus, it is no surprise that Amicus "Professors of Legislative and Statutory Interpretation" focus on this linguistic magic act to support their position. Being versed in the theory they understand its power.[14]

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[12] See e.g. Michael Ryan, Marxism and Deconstruction (Baltimore: Johns Hopkins University Press, 1982); Jane Flax, "Post Modernism and Gender Relations in Feminist Theory," Signs 12 (1987): 621-643; Mary Poovey, "Feminism and Deconstruction," Feminist Studies 14 (Spring 1988): 51-65; Patricia Hill Collins, "The Social Construction of Black Feminist Thought," Signs 14 (Summer 1989): 745-773.

[13] Janet E. Halley, "The Construction of Heterosexuality," in Fear of a Queer Planet, supra at 98.

[14] "The normative debate about how same-sex relationships should be treated has produced a linguistic consensus, whereby a previously marginal use of the term has become increasingly normalized." Brief of Amicus Professors of Legislative and Statutory Interpretation at 14, 17. What the professors fail to note is that the "normalized" use has occurred because most people are unschooled in the arcana of poststructural analysis. As a result, they do not understand that they are being manipulated by gay and lesbian activists who seed public discourse with the term. This seeding enables people like the professors to then point out its use in an amicus brief to a state supreme court advocating recognition of same-sex unions! We note the Appellants' citation to headlines using the term in their brief below in this regard. The State rightly

The subtlety of this technique perhaps illuminates why the state has not emphasized the most obvious ground for upholding the current definition of marriage as rational. The legislature's definition of marriage as the union of one man and one woman comports with every legal and historical definition of marriage known to it. The Appellants can show no text in our law or history which supports their definition. Given this one must ask, which position is reasonable and which unreasonable? By changing the definition of marriage Appellants seek to render such arguments circular (or "incoherent" in deconstructionist terms), but they are only circular if one adopts a deconstructionist position. Similarly, consider the analytical approach suggested by the "Professors of Legislation and Statutory Interpretation." It leads to the bizarre spectacle of seventeen law professors actually arguing that a marriage registration law containing the terms "groom" and "bride" is nevertheless ambiguous as to whether it also encompasses same-sex unions!

In our modern (as opposed to postmodern) world, limiting the definition of marriage to opposite sex couples on the basis that that is what marriage is will always sustain a statute in the face of an equal protection challenge. And indeed, several judges hearing such challenges have felt perfectly comfortable justifying their decisions on this basis alone. Dean v. District of Columbia, 653 A.2d 307, 361-362 (D.C.App. 1995) (Terry, concurring) (not allowing gay and lesbian couples to do the impossible, i.e. to "marry," can never violate equal protection); Slayton v. State, 633 S.W.2d 934, 937 (Tex.App. 1982) ("In this state it is not possible for a marriage to exist between persons of the same sex"); Adams v. Howerton, 486 F.Supp. 1119, 1124 (C.D.CA 1980) (given the "unvarying legal concept and definition of what marriage is" there can be no equal protection or due process violation when persons of the same sex

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pointed out that those articles were generated by press releases issued by advocates of state recognition of same-sex unions. State of Vermont's Reply to Plaintiffs' Memorandum in Opposition to State's Motion to Dismiss at 5 n. 6.

attempt to bring themselves within the meaning of the term "marriage" or "spouse"); Jones v. Hullahan, 501 S.W.2d 588, 590 (Ky.App. 1973) ("no constitutional issue is involved"); Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971) ("There is no irrational or invidious discrimination" in limiting marriage to couples of the opposite sex--"abstract symmetry is not demanded by the Fourteenth Amendment").

Another strand of poststructural analysis is known as reader-response theory. Reader-response theory dismisses the actual meaning of the text or the author's intent. Instead, it focuses on the reader's interpretation. To one reader-response theorist, "what reading a literary text does is more important than what it means . . . ."[15] Others focus on the sociological or psychological makeup of the reader--a process one scholar claims reduces the text to "an indeterminate Rorschach blot."[16]

Appellants' reading of Vermont's Common Benefits Clause reflects this sensibility. It is obvious that when they look at the words of the text they see a guarantee of the right of same-sex couples to enjoy the same legal recognition as heterosexual couples choosing to marry. Their interpretation rests on their own view of the world, their own wants and needs. But there is no explicit textual basis for Appellants' interpretation whatsoever. And when we try to give effect to the intent and meaning of the text's authors we would be hard pressed to argue that they intended the clause to be used in the way suggested by the Appellants. The legal and historical record simply does not support such an interpretation. However, as mentioned above, reader-response theory would find such intent and history irrelevant. The question remains, is this Court authorized to do the same?

Though methods may differ, the end result of poststructural textual approaches is to

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[15] "Reader Response" in The Dictionary of Cultural and Critical Theory, 456.

[16] R. E. Kuenzli, "The Intersubjective Structure of the Reading Process: A Communication-Oriented Theory of Literature," Diacritics 10 (Summer 1980): 47-56.

detach the meaning of a text from the social and cultural context in which it was created. It further assumes that any attempt to resist such efforts is inherently oppressive. The poststructural nature of Appellants' challenge to Vermont's marriage law is obvious. It offers a definition of marriage entirely severed from the context which has always given it meaning. It interprets our Constitution to find protections for which our law and history provide no justification. It assiduously ignores the clear intent of the people who created these texts. It argues that any law or interpretation of law which reflects the shared cultural or social values of the people is inherently oppressive and illegal. In order to grant the relief sought this Court would have to import this poststructural analysis into our constitutional jurisprudence. Few if any courts have embarked on such an experiment and there are very strong arguments why this Court should not do so.[17]

The most obvious reason for rejecting poststructural approaches to statutory and constitutional interpretation is that such approaches are deeply subversive to the organizing principles of our government. Indeed, as pointed out above, they were developed as tools for undermining existing institutions. Our system of government was designed to operate in a modern as opposed to a postmodern world. It relies on the assumption that the authors of our legal texts meant what they wrote and that those interpreting their words would apply the commonly understood definitions of those words. A bedrock principle of that system is that the Court only has the power to give effect to the will of the people as expressed in their

[17] Poststructural influence on the law has most often arisen in First Amendment cases. Anti-pornography ordinances and public college speech codes seek to shift prosecutorial orientation from objective legal precedent or community standards to the subjective response of the complaining witness. This reflects the clear influence of poststructural thought on the radical feminist legal scholars and academics who drafted them. The courts have refused to uphold these poststructurally-oriented solutions, striking them down for violating the First Amendment. R. A. V. v. City of St. Paul, 505 U.S. 377 (1992) (hate speech ordinance); Doe v. University of Michigan, 721 F.Supp. 852 (E.D. Mich. 1989) (speech code); UWM Post. Inc. v. Board of Regents, 774 F.Supp. 1163 (E.D. Wis. 1991) (speech code); American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) aff'd mem. 475 U.S. 1001 (1986) (anti-pornography ordinance).

laws and Constitution. In re WalMart Stores, Inc., 8 Vt. Law Week 233, 236 (9 September 1997); Shields v. Gerhart, 163 Vt. 219, 223 (1995). Poststructuralism explodes that principle since it requires the severing of meaning from the social and cultural context in which it was created. Understanding this, some queer theorists would simply reject the notion of a referential constitutionalism in which the will of the majority as reflected in its organic law must be respected by the court.

> [S]hould civil rights depend upon public acceptance or the quality of organization among the population that seeks those rights? An earlier legal positivism might suggest as much, at least to the extent that it saw rights flowing only from real political processes. This positivism, however, has been increasingly rejected by contemporary legal thinkers. In its place has come a notion of rights and of law that makes an appeal to some higher moral principles—to a sense of right and wrong.[18]

If one follows the course advocated above what is left? On what basis does a court interpret the meaning of the law if not within the context in which it was created? On what basis may it find rights which do not flow from "real" political processes? What other kind of political processes are there?

Appellants' approach erodes the relationship between judge and text, freeing the Court to determine the controversy based on the newly privileged discourse offered up by the Appellants—a discourse totally detached from the values and judgments of the people who created the texts in the first place. This is not democracy, it is despotism.[19]

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[18] Peter M. Cicchino, Bruce R. Deming, Katherine M. Nicholson, "Sex, Lies, and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill," in Didi Herman and Carl Stychin, eds., Legal Inversions: Lesbians, Gay Men, and the Politics of Law (Philadelphia: Temple University Press, 1995), 158-159. These same authors suggest that gays and lesbians engage in a "noble lie" involving the "selective withholding of information" and the "presentation of a limited, culturally non-threatening public persona" in order to pursue their political agenda. Id. at 158. We suggest that intentionally or not, Appellants' suit covers a radical challenge with a thin veneer of traditional liberal rights language.

[19] The most damning criticism of poststructuralism applied to politics has grown out of revelations that two of its leading figures, Martin Heidegger and Paul de Man, were Nazi collaborators during World War II and remained unrepentant about it for the rest of their lives. Critics both within the poststructural movement and those outside it have pointed out the inherent potential of the theories to undermine democratic institutions. See, e.g., Exchange between Charles Griswold and Denis Donohue in "Deconstruction, the Nazis and Paul de Man," New York Review of Books, 12 October 1989, p. 69.

2. The Analytical Framework Urged by Appellants Will Have Radical Consequences for the Distribution of Power between Our Legislature and Our Courts.

If one adopts the analytical framework advanced by Appellants what will be the implications for legislative power in the future? It would seem that any legislation which differentiates between people on grounds other than the purely economic would be constitutionally suspect. The legislature would be reduced to a kind of hyper-rational body prohibited from passing any legislation which in any way sounds in shared cultural, social, or moral values since such legislation could always be successfully challenged along the grounds advanced by Appellants. Two examples illustrate the potential consequences of such action: polygamy and religious marriage.

Appellants emphatically deny that their challenge has anything to do with polygamy or religious marriage. In fact, it implicates both. Should this Court grant the relief sought by the Appellants it will be impossible for it to turn back a challenge by those seeking state recognition for polygamy. All of the arguments made by Appellants that would deny the legislature the power to withhold recognition of same sex unions apply equally to those advocating polygamy or any other kind of non-traditional domestic union one could imagine. There has got to be something suspect about an argument that would make it a constitutional violation for the legislature to deny recognition to polygamous unions. Similarly any criminal or civil law based on moral, cultural, or social values would be vulnerable to the kind of challenge Appellants bring here. On what rational grounds other than shared social values could the state justify prohibiting prostitution, animal cruelty, drug use, and assisted suicide? Prohibitions on these actions pass constitutional muster because they reflect the values of our people and not because they can pass the kind of hyper-rational utilitarian evaluation urged by Appellants.

Similarly, if this Court grants the Appellants the relief they seek it is quite conceivable

that members of the clergy will be barred from solemnizing marriages within the traditions of their church. Our current law permits members of the clergy to solemnize weddings—the only non-officials permitted to do so. 18 V.S.A. § 5174. Vermont law makes them agents of the state for this purpose. If this Court declares that the state must recognize same sex unions as it does marriage what will happen when a Catholic priest refuses to perform a wedding for a same-sex couple? Will not the next challenge before this Court seek to strip this state power from any who refuse to perform weddings involving same-sex couples? After all, same-sex unions will now be constitutionally protected.

We raise these issues merely to bring home to the Court the radical consequences which flow from the analytical framework Appellants use to justify their position. We also raise them to make clear that the Court's adoption of such a framework in its equal protection jurisprudence will fundamentally alter the power of the General Assembly to legislate in the many areas which have always been its purview.[20]

3. Appellants' Challenge Is Not Entitled to An Equal Protection Analysis.

Appellants might argue that they are not asking this Court to ignore the meaning of the Constitutional text, but are rather asking it to give effect to its promise of equal benefits. But this argument requires a definition of equal protection so expansive that it renders that clause meaningless. Neither state nor federal equal protection law contemplates so broad an application as that urged by Appellants.

In order to challenge legislative action on equal protection grounds, a person denied a right must show that she is similarly situated to one who has not been so denied. Simply being

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[20] Appellants fairly bristle at the idea that the legislature can legislate based on an understanding of normative behavior. Appellants' Brief at 49-54. In fact the Constitution not only authorizes it to do so, but expects that it will. Chapter II § 67 of the Constitution, the "virtue" clause which figured so prominently in this Court's decision in Brigham gives the legislature broad authority to legislate based on normative standards. See Brigham v. Vermont, 8 Vt. Law Week 41, 45 (11 February 1997).

a citizen who wants a right currently granted to another is not sufficient to render one similarly situated. State v. Reynolds, 109 Vt. 308, 312 (1938) (a defendant convicted of perjury at a trial brought under Vermont's banking laws is not similarly situated to the Commissioner of Banking and Industry who has immunity from suit under same laws); see also Plyler v. Doe, 457 U.S. 202, 216 (1982) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. The initial discretion to determine what is 'different' and what is the 'same' resides in the legislatures of the states."); SBC Enterprises, Inc. v. City of South Burlington, 892 F.Supp. 578, 586 (D.Vt. 1995) (promoter of nude dancing business not similarly situated to owner of movie theater for equal protection purposes "the Clause guarantees equal protection to persons 'similarly situated.' However, the legislature has substantial latitude in determining what is 'similar' in relationship to the problem being addressed."); Gonyaw v. Gray, 361 F.Supp. 366, 368-369 (D.Vt. 1973) (children in public school not similarly situated to children in a juvenile correctional facility hence equal protection not applicable).

In the same vein, many courts ruling on equal protection challenges to state marriage law have simply pointed out that men who wish to marry men and women who wish to marry women are, by definition, not similarly situated to men and women who wish to marry members of the opposite sex. Dean v. District of Columbia, 653 A.2d 307, 361-362 (D.C.App. 1995) (Terry, concurring) (not allowing gay and lesbian couples to do the impossible, i.e. to "marry," can never violate equal protection); Slayton v. State, 633 S.W.2d 934, 937 (Tex.App. 1982) ("In this state it is not possible for a marriage to exist between persons of the same sex"); Adams v. Howerton, 486 F.Supp. 1119, 1124 (C.D.CA 1980) (given the "unvarying legal concept and definition of what marriage is" there can be no equal protection or due process violation when persons of the same sex attempt to bring themselves within the meaning of the

term "marriage" or "spouse"); Jones v. Hullahan, 501 S.W.2d 588, 590 (Ky.App. 1973) ("no constitutional issue is involved"); Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971) ("There is no irrational or invidious discrimination" in limiting marriage to couples of the opposite sex--"abstract symmetry is not demanded by the Fourteenth Amendment").

In order to overcome this problem, Appellants simply change the definition of marriage from a union of one man and one woman to any two people who are committed to one another. Like magic, gay men and lesbians are now similarly situated for equal protection purposes. But from where did the authority for such a definition come except from the minds of the Appellants and their lawyers? Can they simply tear marriage away from its legal and historical context in order to cram it into a constitutional challenge?[21]

This Court has rejected such challenges in the past. In turning aside an appeal by a criminal defendant who argued that the jurors' oath unduly prejudiced his chances for acquittal, this Court laid down a sound rule in dealing with such novel arguments.

> A construction of the Constitution which runs counter to long established practice will not lightly be indulged in. It is only where the plain and obvious meaning is to the contrary that the Court will disturb a construction of the Constitution put upon it by long acquiesence and practice. This is particularly true when the respondent attempts to read something into the Constitution which clearly isn't there.

State v. Graves, 119 Vt. 205, 215-216 (1956) (emphasis added). The Court went on to note that the weight of more than a century and a half had fixed the construction of the Constitution "too firmly to allow it to be shaken by an attempted interpretation which would fundamentally alter" law enforcement efforts.

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[21] The problems of adopting the framework proposed by the Appellants apply equally to their suspect classification challenge and the argument that the right of men to marry men and women to marry women is fundamental. In order to grant relief based on those theories the Court would have to rely on the same poststructural assumptions urged on behalf of Appellants' rational relationship challenge.

C. "Societal Changes" Are an Inappropriate Source of Authority on Which to Base a Decision in This Case.

Given the lack of historical and textual authority for their arguments, Appellants are left with only two choices: change the terms of debate by resort to poststructural methods or convince the Court that it should rule based on "societal changes." Appellants' Brief at 19-21, 45-49. We have already shown why the first choice should be rejected by this Court and believe that resort to the second would also sever the Court from its constitutional moorings. For like the Appellants' poststructurally-oriented arguments, their "societal changes" interpretation is another example of a rhetoric which divorces texts from the legal and historical context which ordinarily gives them their meaning. For it is one thing to rely on societal changes to decide a case when there is textual and historical support for such an interpretation. But where, as here, that reliance is wholly unsupported by textual or historical evidence, we cannot understand how a "societal changes" analysis can create a new constitutional right.

1. This Court's Decisions in Brigham and Choquette Are Not Applicable to the Instant Case.

While one could argue that the Brigham and Choquette decisions were based on societal changes, they were each supported by an obvious historical or textual record—characteristics absolutely lacking in the instant case. Brigham relied on specific constitutional language requiring the support of public schools. Vermont's history of supporting access to public education is as old as this state. In other words there was a text and a history the Court could use in determining that Vermont's school tax scheme no longer complied with the rights and values contained in the Constitution. And much of the Court's opinion was taken up with historical analysis. 8 Vt. Law Week 41 (11 February 1997).

Choquette v. Perrault, 153 Vt. 45 (1989), was an unusual and highly fact-specific case. We question its precedential value to a case which involves a fundamental organizing

institution like marriage. In Choquette, the Court was reacting to both the confiscatory nature of Vermont's fence maintenance statute as well as the fact that it ensnared a few people in a system not intended for them. Nevertheless, in that case the Court recognized that historically speaking the impulse behind the fence maintenance law had ceased to exist. In so deciding, the Court must have known that its actions would not result in a drastic redefinition of a fundamental aspect of life, would not necessitate the redrafting and redefining of massive numbers of statutes, and would be in accord with most people's current understanding of property rights law. The same could hardly be said if such action were taken in the instant case.

The Court's reliance on societal changes in deciding those cases is demonstrably different from what would be involved here. There is no textual or historical hook on which this Court can hang such a decision. Furthermore, it is obvious that the issue of state recognition of same-sex unions is a very new development—even among gay people—and does not reflect the enormous and long-established changes responded to by the Court in Brigham and Choquette.[22]

2. The Statutory Extension of Civil Rights to Homosexuals Does Not Justify This Court Taking the Issue of Same-Sex Unions away from the People.

Appellants and Amici have argued that Vermont's legislative history in the area of gay rights is an indication of changing attitudes on which this Court can rely to justify finding that Vermont's marriage registration law includes same-sex couples. Appellants' Brief at 15; Amicus Brief of Professors of Legislation at 25. This is an odd argument for several reasons.

[22] Appellants' reliance on Loving v. Virginia, 381 U.S. 1 (1966) for their societal change argument is similarly misplaced. That decision came in the wake of two hundred years of debate on the place of African-Americans in the civil society, one civil war, three constitutional amendments, one hundred years of Supreme Court case law, massive civil rights agitation over a twenty-year period, and the fact that bans on miscegenation were never universal but always an act of positive law. Compare that to the brief history of the same-sex marriage movement, the universal prohibition on same-sex unions, and the total lack of historical or textual support for Appellants' position.

In the first place, the rights Appellants point to were established by legislation rather than judicial imposition. This seems to confirm that creation of new rights involving homosexuals is a legislative, rather than a judicial function. Second, it is bizarre to argue that a legislature, by passing some statutes in a particular area, at some point thus gives up its right to legislate further in that area. Is there some point of no return at which a legislature has its lawmaking power taken away by the Court? And if so, what are the public policy implications for this theory? Will not legislatures shy away from reforming their laws in various areas because of the fear that courts will see this as a sign of changing attitudes sufficient to take the power of lawmaking away from them?

V. CONCLUSION

Appellants' challenge to Vermont's marriage registration law appears couched in a typical liberal rights discourse. We have shown that this case really involves a radical challenge both to Vermont's marriage registration law as well as to our system of constitutional government. We do not ascribe any kind of sinister motive to Appellants in framing their argument based on poststructural approaches. For all we know, Appellants may not even be aware of the influence of this analysis on their arguments. But motivation is irrelevant. For regardless of the intent, the effects are the same. And we believe those effects are disastrous for the legitimacy of constitutional government.

Members of this Court may feel in their hearts that it is unjust that same-sex couples cannot currently register their unions with the state. But there is a viable, democratic process available to change the law—a process that gays and lesbians have used to great effect in the past. We worry that in its desire to right what it sees as an injustice, the Court will adopt a jurisprudence that makes a constitutional government founded upon consent untenable.

The implications of life in such a world are profoundly disturbing to us. Queer theorist Cindy Patton, who argues that the consent upon which our government depends for its legitimacy is in fact "staged," tells us what living in a postmodern world would be like.

> If the modern state's business was to legitimate its existence in the absence of theological justification, to produce itself as a visible, secular, central organizational force . . . then the postmodern state seems concerned to recede from visibility, to operate blindly as a purely administrative apparatus to an apparent market democracy. If the modern state had to describe its existence in terms of reason, suggesting in one way or another that it was an outcome of the social contract, capable of organizing consent and policing deviation, the postmodern state has to pose itself as capable of administering an incoherent, incommensurable plurality of interests. The modern state integrates social factions to resolve conflict; the postmodern state holds pluralities apart. Instead of invoking an organicist logic that links the nation to the individual through increasingly smaller collectivities like the province, the township, and the family, the postmodern state proposes lateral linkages, communities or consumption units held in relation to one another and operating through the commercial logic of a free market that circulates rather than negotiates freedoms.[23]

Patton paints a clear--and to our mind--stark contrast between the modern and postmodern state, between coherence and incoherence, between unity and faction, between a sense of (negotiated) shared values and unending conflict. In deciding this case, the Court is faced with making a choice between these two models—these two visions. Which will it choose?

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[23] Cindy Patton, "Tremble, Hetero Swine!" in Fear of A Queer Planet, supra, at 172.

WHEREFORE, *Amicus Curiae* Take It to the People urges this Court to find that Vermont's marriage registration law does not require the State to recognize same-sex unions and that that law does not violate Vermont's Constitution.

Respectfully submitted this 29th day of April, 1998.

TAKE IT TO THE PEOPLE

By: _____

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