

Findings



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Protecting Marriage in N.C.

North Carolina Law and the Preservation of Marriage

By Paul Dye



The ongoing national controversy over a Federal Marriage Amendment highlights the fact that the issue of same-sex marriage has moved front and center in the

American political landscape. Opponents of the Federal Marriage Amendment in Congress have said that the issue should be left up to the states. Meanwhile, proponents say that it is necessary to protect the states. At the same time, opponents of a constitutional amendment at the state level have said that North Carolina's laws are sufficient to protect marriage, while supporters say that North Carolina's marriage laws are vulnerable to redefinition by the courts. This paper will examine the status of North Carolina law, discuss why marriage is vulnerable to redefinition by an activist court and explain why an amendment to the North Carolina Constitution is necessary to protect marriage.

Here in North Carolina, some activists who want to re-write our marriage laws through the courts are already making attempts to do so. In March of 2004, a same-sex couple sued Durham County in District Court in an effort to force the county to grant them a marriage license. Although this suit was dismissed, more are likely to follow. The Buncombe County Register of Deeds office has reported that they have received dozens of calls asking about same-sex marriage licenses.¹ At least one Charlotte same-sex couple has attempted to obtain a marriage license.² In the midst of these challenges, a majority of North Carolina's voters are in favor of an amendment to prohibit same-sex marriage.³

These actions reflect a nationwide trend. Same-sex marriage is not being advanced by legislatures or votes of the

people. Instead, it is happening in the courts, where judges are creating the right to same-sex marriage. However, when the issue goes before the people, a large majority of voters support defining marriage in their state constitution as the union of one man and one woman.⁴

The State of Things

North Carolina's current laws are clear: marriage is exclusively a union between one man and one woman at one time. The text of those laws reads that "a valid and sufficient marriage is created

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by the consent of a male and female person..."⁵ and that "marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina."⁶ However, given that the definition of marriage is statutory, it is open to challenge under North Carolina's constitution. While this may seem unlikely, history reveals that the only instances of legalizing same-sex marriage have occurred when state courts "found" a right to same-sex marriage under state constitutions.⁷ After a Hawaii court ruled in 1996 that the state's marriage law violated the state's Equal Rights Amendment, the state passed a constitutional amendment defining marriage as exclusively between a man and a woman.⁸ In Alaska, after the state Supreme Court ruled in favor of same-sex marriage, the court was overruled by a constitutional

amendment.⁹ There is also a move in the Massachusetts legislature to pass a constitutional amendment that would overturn the Massachusetts high court's decision creating same-sex marriage.¹⁰ Clearly, there is a move to use the judiciary to redefine marriage. In fact, a case was filed in Florida in July, 2004 by a Florida same-sex couple who obtained a marriage license in Massachusetts, returned to the Sunshine State, and is suing to challenge the constitutionality of the Defense of Marriage Acts (DOMA) of both Florida and the United States.¹¹

In addition to efforts to legalize same-sex marriage, efforts are underway to legalize polygamy by invoking the U.S. Supreme Court's *Lawrence v. Texas* ruling, which struck down Texas' ban on sodomy.¹² One example is a lawsuit in Utah challenging that state's ban on polygamy. Citing the *Lawrence* decision, the lawsuit says that the U.S. Constitution protects private, intimate conduct and should thus allow polygamy.¹³

The current trend in state courts toward judicial activism demonstrates the need for the North Carolina General Assembly to protect the institution of marriage with the strongest possible law—a constitutional amendment. In fact, a constitutional amendment is the only way that the General Assembly can assure that state courts do not define the issue for the people, rather than the other way around. After all, a constitutional amendment cannot be ruled unconstitutional by a North Carolina state court.

Imagine for a moment some scenarios that North Carolina's courts are likely to face in the near future:

- What would happen if a Massachusetts same-sex couple, legally married in Massachusetts, moved to North Carolina to pursue a job?

- Consider the implications for North Carolina law if that couple attempted to file their taxes jointly, attempted to adopt a child, sought a legal divorce in North Carolina courts, or if one partner died and there was a probate issue for our courts to decide?
- Would North Carolina be forced to recognize another state's marriage even though North Carolina has explicit state law that defines marriage exclusively as the union between a man and a woman?

The most likely legal scenario is that the same-sex couple above would be denied marital benefits by the state of North Carolina, resulting in suits being filed in state and federal court challenging the constitutionality of the laws which define marriage as exclusively between one man and one woman. With the current statutory definition of marriage, the state courts would theoretically have the option of overturning the North Carolina General Assembly's definition of marriage and base the decision on their interpretation of North Carolina's constitution. The most likely source for such a ruling would be the "Equal Protection" clause, which states "no person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."¹⁴ Citing language not unlike this, the Massachusetts Supreme Judicial Court found that Massachusetts state laws that prohibited same-sex marriages were unconstitutional under the Massachusetts Constitution.¹⁵ Only after this decision did the Massachusetts Legislature take up the issue of an amendment to define marriage as exclusively between a man and a woman.¹⁶

Full Faith and Credit

State courts may also have to wrestle with whether or not the Full Faith and Credit Clause of the United States Constitution¹⁷ requires North Carolina to recognize marriages granted in other states. The Full Faith and Credit Clause is normally understood to require that the states recognize each other's legal judgments, acts, and public records.¹⁸ However, there is some disagreement as to exactly how that should play out, given Congress' ability to determine the effect of such judgments, as will be discussed below.¹⁹ In light of this controversy, there is a great deal of discussion in the legal community about how the courts should decide a claim brought by same-sex couples who have been married in one state, but are suing

for recognition in a state that does not recognize same-sex marriage.²⁰ It seems that under the current law, North Carolina's courts would be well within the law to refuse to apply anything other than North Carolina's statutory definition of marriage. First, the Federal Defense of Marriage Act of 1996 (DOMA) states that "no state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."²¹ This federal law effectively prevents claimants from making an argument under the Full Faith and Credit

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Clause in either state or federal court. It should also be noted that the federal DOMA prevents claimants from obtaining declaratory judgments in states friendly to same-sex marriage and suing to have those judgments recognized in other states.²² This is an example of Congress' power to prescribe the effect of each state's judgments on its sister states via the Full Faith and Credit Clause.²³

Second, the U.S. Supreme Court stated in *Williams v. North Carolina* "every state is entitled to enforce in its own courts its own statutes, lawfully enacted."²⁴ In that case, there was a question as to whether North Carolina would have to honor the divorce judgment of a Nevada court, even when the divorce would not have been possible under North Carolina law.²⁵ The Court seemed to draw a distinction between divorce decrees, which are judgments, and conflicting statutes.²⁶ Surely conflicting marriage statutes would fall under the latter category. *American Jurisprudence* defines a judgment as a judicial action of a court.²⁷ The Court reaffirmed this distinction in *Baker v. General Motors Corp.*²⁸

However, it should be noted that absent the federal DOMA, conflict of law principles are rather unclear about whether states would have to recognize certain marriages from other states. For example, the U.S. Supreme Court stated in *Loughran v. Loughran* that "marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction."²⁹ (emphasis added) The key seems to be figuring out exactly what the Court meant when it said "or otherwise declared void by statute." Given that North Carolina's current DOMA claims to invalidate all same-sex marriages that are sought to be recognized in North Carolina, it follows that the law would indeed prevent the recognition of same-sex marriages in North Carolina. In fact, in *American Family Laws*, which the Court cited in *Loughran*, the point is made that otherwise valid marriages are to be honored as valid everywhere, but an "exception is made of . . . marriages declared invalid by the local legislature as opposed to settled public policy of the state."³⁰

What does all of this mean to North Carolina? If a Massachusetts same-sex couple gets married and eventually moves to North Carolina, it is likely that North Carolina's laws will not recognize their "marriage." However, this analysis is all subject to the interpretation of the federal and state constitutions by the courts. If a state judge believes that the current North Carolina DOMA law is unconstitutional, he or she could overturn the law (or simply refuse to follow it) and grant recognition of a same-sex marriage.

The only way to prevent this is to amend the North Carolina Constitution. Similarly, the only way to protect our state and federal DOMA laws from an activist federal judiciary is to amend the Federal Constitution. At this point, a federal amendment is a different issue altogether. However, the chance to protect marriage in North Carolina with an amendment could be lost forever if action is not taken soon. The question is not whether marriage will be legally defined (or redefined)—the question is who will define it? Will it be the elected legislative representatives in the General Assembly and the people of North Carolina or a judge in a courtroom?

As this debate moves forward, a fundamental question has emerged. Do Defense of Marriage laws and amendments, which define marriage as exclusively

between a man and a woman, violate substantive due process and equal protection principles?

Substantive Due Process

The Supreme Court has traditionally ruled that the Equal Protection Clause of the Constitution guarantees not only procedural due process (“fair process”), but also requires “heightened protection against government interference with certain fundamental rights and liberty interests.”³¹ This heightened protection requires a compelling governmental interest and means that laws are narrowly tailored to achieve that interest.³² Examples of fundamental rights and liberty interests that have previously been recognized by the Court are the right to have children, to direct the education of one’s children, to utilize contraceptives, to have abortions, and most pertinent to this discussion, the right to marry.³³ The right to marry was first outlined as a fundamental right in the 1967 case of *Loving v. Virginia*, which involved the striking down of statutes that prohibited interracial marriage.³⁴ This case is often cited by those who favor same-sex marriage under the premise that since the Court held that statutes prohibiting biracial marriages violated the 14th Amendment, statutes that prohibit same-sex marriage must also be unconstitutional. This conclusion is misleading in several ways.

The right to marry that is discussed in *Loving* is understood to be marriage as between a man and a woman. This is patently obvious when one examines challenges to traditional marriage, which have arisen in our nation’s past. In 1885, the U.S. Supreme Court upheld national polygamy bans and actually defined the fundamental unit of the family (i.e., marriage) as “one man and one woman in the holy estate of matrimony.”³⁵ The Court has always assumed marriage to be opposite-sex in nature. Otherwise, statements such as “marriage and procreation are fundamental to the very existence and survival of the race”³⁶ cannot be explained. It stands to reason that the Court was contemplating the reproductive potential of opposite-sex marriages when it referred to such marriages as vital to the continuation of the species. Same-sex relationships are by definition incapable of procreation and cannot contribute to the furtherance of the species. It should be obvious to honest readers that past decisions discussing the fundamental right to marry have always referred to marriage as between a man and woman.

But don’t all couples enjoy the fundamental right to marry? The answer is a most emphatic no. The Court makes no provision for marital rights to be vested in groups, but has stated that “the right to marry is of fundamental importance for all *individuals*” (emphasis added).³⁷ This means that although every person has the right to marry, there are certain inherent limitations on that right. For instance, no woman is able to marry her brother. No one is able to marry someone who is not of legal age. No one is able to marry their car. No one is able to marry his or her self. The nature of marriage simply does not permit the redefinition of the institution to encompass whatever a person might desire it to be any more than the chemical make-up of water changes according to one’s opinion. To take another approach, it is

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well settled that individuals enjoy a right to vote. It would be ludicrous to assert that one should be able to exercise that right simply by screaming a candidate’s name from the rooftops, all the while attempting to convince everyone else that the accepted definition of voting by traditional means is too narrow or that it limits his fulfillment or enjoyment of life.

With the determination that there is no fundamental right to same-sex marriage, the Court would then require a “rational basis” for laws which limit marriage to opposite-sex relationships. Under the rational basis test the Court is supposed to look at whether a law is “rationally related to legitimate government interests.”³⁸ If the law addresses the health, safety, and welfare of the State’s citizens, then the law has a rational basis and should be upheld by the Court. In this case, a rational basis is clearly evident from the numerous studies and evidence that show the negative physical and psychological consequences that accompany homosexual behavior.³⁹

Additionally, though the U.S. Supreme Court has not recognized a fundamental right to same-sex marriage, it has recognized a fundamental right to travel.⁴⁰ This is an example of another right that might

come into play if a same-sex couple asserts that having become legally married in one state, they cannot travel to another state without giving up their marital status. Therefore, the argument goes, they have given up the right to travel. Although interesting, this argument is generally considered weak. Most commentators seem to believe that the Court would require the couple to use traditional conflict of law principles instead of asserting a fundamental right.⁴¹

Equal Protection

There have been some attempts to characterize laws that define marriage as strictly between one man and one woman as unconstitutional on the basis of gender discrimination. This argument is flawed because the law affects both genders equally. The law requires that “all persons similarly situated shall be treated alike.”⁴² In fact, the Supreme Court has “consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways.”⁴³ In marriage laws, men and women are treated exactly alike—neither sex is allowed to marry members of their own sex, close relatives, persons who are not competent, etc. Similarly, all people with all manner of sexual preferences are treated equally under marriage laws. The laws that apply to one apply to all.

Conclusion

There can be no more important task for government than the defense of the family, which is the foundation of our society. Thus, it is imperative that marriage itself be safeguarded from redefinition by the courts. Same-sex marriage is not being advanced by state legislatures or by votes of the people. Instead, it is the courts that have created legal recognition of same-sex marriage.

North Carolina has strong laws in place that may defend marriage, up to a point. However, because these measures are statutory, marriage is still open to challenge under North Carolina’s constitution. And as recent events in this state and others have shown, efforts are already underway to undermine marriage and challenge the current definition constitutionally. Strong laws and even a favorable judiciary are never a certainty. It is impossible to predict what legal challenges and changes may come. Therefore, a constitutional remedy is the only certain solution.

Some will say that passing a marriage amendment is redundant and unnecessary, or politically motivated. This is untrue.

History has shown that the very institution of marriage is at stake with this decision. And it is difficult to imagine anything that is more deserving of protection than the time-honored institution of marriage.

Paul Dye worked with the N.C. Family Policy Council as a legal intern from the Alliance Defense Fund's Blackstone Fellowship during the summer of 2004.

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