



Judges Not

Vermont and the new Democratic push for same-sex marriage.

by W. James Antle III

SINCE 1993, WHEN HAWAII'S state supreme court began threatening to inflict a radically new definition of marriage on an unwilling populace, the gay marriage debate has generally played out along predictable lines. Judges rule that marriage as it has always existed in our society is somehow unconstitutional. The people, either directly or through their elected representatives, reassert the validity of existing constitutional and social norms.

By the time Hawaii's highest court finally made good on its threats in 1997, the federal government had already passed legislation stating that it would not recognize same-sex marriage and that no state had to do so. Enacted during an election year, the Defense of Marriage Act sailed through the House by 342 to 67 and the Senate by 85 to 14. It was signed into law by Bill Clinton, who had been more sympathetic to gay rights than any president in history. Then Hawaii's voters made it a moot point, amending their state constitution to reaffirm traditional marriage through a ballot initiative that won nearly 70 percent of the vote.

Every time the voters have gotten to rule on same-sex marriage, their verdict has been the same: a resounding "I don't." This has been as true in Democratic states like Hawaii, Oregon, Wisconsin, and California, where Golden State African Americans turned out in large numbers to pull the lever for both Barack Obama and Proposition 8, as in deeply conservative states like Mississippi. Arizona narrowly rejected a defense-of-marriage amendment in 2006 because opponents convinced a critical mass of voters that it would affect benefits for elderly roommates. When the language was clarified, Arizonans voted against same-sex marriage in 2008.

Vermont's state legislature has fundamentally altered this pattern by overriding the governor's veto of a bill allowing same-sex marriage in the Green Mountain State. For the first time, marriage

was being redefined democratically rather than by judicial fiat. The old procedural arguments linking same-sex marriage to activist judges will no longer suffice. Social conservatives will have to see what is left of the "marriage culture" in this country if they are to prevail.

In truth, the ground has been subtly shifting for the past decade. De facto same-sex marriage first came to Vermont the same way it did everywhere else. In 1999, the state supreme court ordered the legislature to give same-sex couples the same benefits as married men and women. Yet the elected officials in Montpelier flinched from calling this new arrangement "marriage," instead creating the parallel institution of "civil unions." The state constitution gave the voters no recourse through ballot initiative, but the Defense of Marriage Act confined the damage to Vermont's state lines.

Something similar occurred in Massachusetts when the commonwealth's supreme judicial court imposed same-sex marriage in November 2003. The process for amending the state constitution was difficult—an amendment must pass in two consecutive legislative sessions before it can reach the ballot—allowing liberal legislators to keep the issue away from the electorate. Thus same-sex marriage endured in Massachusetts as well, though limited to in-state residents by a 1913 statute as well as by federal law. Since then, the state supreme courts of Connecticut and Iowa have ruled in favor of gay marriage, bringing the total number of such states to four.

Yet what started through judicial activism began to acquire a kind of democratic legitimacy over time. There was a "Take Back Vermont" backlash against a handful of pro-civil union legislators, but it was insufficient. In Massachusetts, the backlash against legislators who kept the people from voting on full gay marriage was practically nonexistent. By late 2003, polls started showing a plurality of Massachu-

setts voters in favor of same-sex marriage even though a defense-of-marriage amendment had been considered likely to pass in the commonwealth as recently as 2002 (the legislature kept it from appearing on the ballot).

When Vermont's legislators finally decided to go all the way on same-sex marriage, they did so with the full confidence that there would be no political consequences. Elected officials in other liberal states have been similarly emboldened. Even though Californians have twice voted against same-sex marriage, the legislature has twice tried to redefine marriage by statute (Gov. Arnold Schwarzenegger vetoed both bills). Connecticut is getting ready to democratically legitimize its state supreme court ruling. New York Gov. David Paterson isn't doing much right, according to the polls, but his bill to create gay marriage is one thing voters seem to like: a Siena College survey showed 53 percent of New Yorkers support the legislation while only 39 percent oppose it.

Although the numbers have declined since the mid-1990s, a majority of Americans still oppose same-sex marriage. In fact, there hasn't been much movement on this question in national polls over the last five years despite the gay marriage juggernaut at the state level. But support for same-sex marriage has become a mainstream liberal position, like supporting abortion or gun control. The late Sen. Paul Wellstone, arguably the most liberal member of the Senate at the time, voted for the Defense of Marriage Act in 1996. Today, President Obama's opposition to gay marriage is purely nominal—he even favors the Defense of Marriage Act's repeal, opening the door for judges to impose what he lacks the courage to do himself.

WHAT HAS PROTECTED THE national consensus against same-sex marriage for the past 16 years is precisely that it was not a blue state vs. red state issue. Popular majorities defined marriage as a union between a man and a woman virtually everywhere. Same-sex marriage was possible only in a handful of easily isolated states where there was no check against judicial activism, hemmed in by federal law and 30 state defense-of-marriage acts. The old consensus will quickly unravel if same-sex marriage is democratically enacted in more liberal states on the two coasts while being democratically opposed everywhere in between.

The ensuing debate has the potential to make our long national conflict over abortion seem tame.

“Say this for abortion: It's a geographically specific event, and once it's over, it's over,” observed David Frum in his column for the *Week*. “By contrast, there's nothing like marriage for generating unceasing litigation, with ramifications that are sure to cross state lines.” The potential for conflict is even greater given how unpredictable state and federal courts have been on the issue, and the fact that the Obama administration can hardly be depended on to defend the constitutionality of the existing federal law.

Supporters of same-sex marriage will try to use the courts to impose their will on states where gay nuptials cannot be enacted democratically. Opponents will redouble their efforts to push for a federal marriage amendment, which would overrule the will of the voters in states like Vermont. A scenario in which liberals on both ends of Pennsylvania Avenue try to gut the Defense of Marriage Act while courts overturn traditional marriage laws is easy to envision. It is much harder to see how a constitutional amendment against same-sex marriage could pass, since it went nowhere under President Bush and the Republican Congress.

In 2004, the House did pass the Marriage Protection Act, which would have stopped federal courts from imposing same-sex marriage by stripping them of all jurisdiction over the issue. The Bush administration said the president would sign the bill, but it stalled in the Senate. Its author, Rep. John Hostettler of Indiana, was swept out of Congress along with the GOP majorities in 2006. Social conservative groups might be reluctant to support a new version of the bill because it would not stop state judges, like those on the Iowa and Connecticut supreme courts, from issuing gay marriage rulings.

Gay marriage proponents sense that the momentum is on their side, with *New York Times* columnist Frank Rich sneering that even the sophisticated pro-marriage arguments of Princeton University's Robert George and syndicated columnist Maggie Gallagher are merely “the bigots' last hurrah.” The announcement that John McCain's campaign manager supports same-sex marriage reveals that what passes for enlightened social commentary at the *Times* is on its way to becoming the bipartisan conventional wisdom. If social conservatives can't adapt to the marriage debate's new terrain, it will become the official history learned by their children. ❁

W. James Antle III is associate editor of *The American Spectator*.



Hazardous Times Ahead

by Tom Bethell

I WORRY THAT BY THE TIME OBAMA is through with us, the U.S. will be a second-class country. A lot of people feel the same way. A similar concern has been in the back of my mind for years. In the Carter era I also worried about the fate of the country, but I have to say that the hazards seem far greater now.

After the Berlin Wall came down I thought the obvious lesson—that socialism doesn't work—would penetrate the skulls of our domestic intelligentsia. But somehow it never did. They never regard a limit to government expansion as a desirable thing. Nothing seems to have been learned from the fall of Communism—the great history lesson of the 20th century.

Consider health care, much in the news. When I first came to America, people would inquire about Britain's "socialized medicine." Their tone was politely skeptical. Was it really free? Well, no. You're not charged when you go to the doctor, but everyone pays because taxes are much higher. The National Health Service was introduced in 1948 (it now employs more than 1.3 million people), and before that, if you went to the doctor, you paid for the service. To blunt the blow of misfortune there was private insurance, and doctors recognized a moral obligation of charity toward the indigent.

Today, almost everyone will acknowledge that America's private health system delivers better services than the state does in Europe. ("Formerly private," I should have said.) Don't forget, the Soviet Union also had "free" medical care, and good luck if you went to a doctor in Leningrad. Maybe things have improved now that it's St. Petersburg again.

Yet today, with little sense of *déjà vu*, America is moving toward nationalized health. Obama made "a promise" of "affordable high-quality care available to every American." The thrust of politics will be to make health care much more expensive for

the nation as a whole, and of lower quality—without intending any such decline.

A few words about education: Until the 19th century, it too was something that the customer paid for. By the 1870s, however, all states were providing "free" elementary education. Today, private schooling has become a much more valuable good than it was 50 years ago, when government schools still functioned properly. They had not yet collapsed under the influence of teacher unions, progressive politics, and the decline of the family. So government schooling remained a viable alternative.

Even today, in the better suburbs vigilant parents have been able to maintain standards to some extent by keeping close track of what goes on in school. The true victims of public education are the inner-city poor, where all liberal reforms have worked to their disadvantage. A comparable trend may well reappear with universal health care.

I sometimes wonder whether progressive elites really care about education. My suspicions were aroused when I read in a book by Robert Conquest that Lenin said he didn't care about the education of the Soviet masses, disavowing Communist propaganda on the issue. All Lenin cared about was whether the *proles* could understand and obey the Party's instructions.

Do the liberals care about our chaotic urban schools today? No doubt some do. But effective action would mean challenging unions and the whole progressive mindset. As long as the unions keep delivering the votes, they will continue to exercise a major influence over the Democratic Party and will be allowed to run their own show—whether or not the inner-city kids learn to read or write. The recent shutdown of the voucher program in D.C. showed that the education of poor blacks is not an important consideration for the establishment.