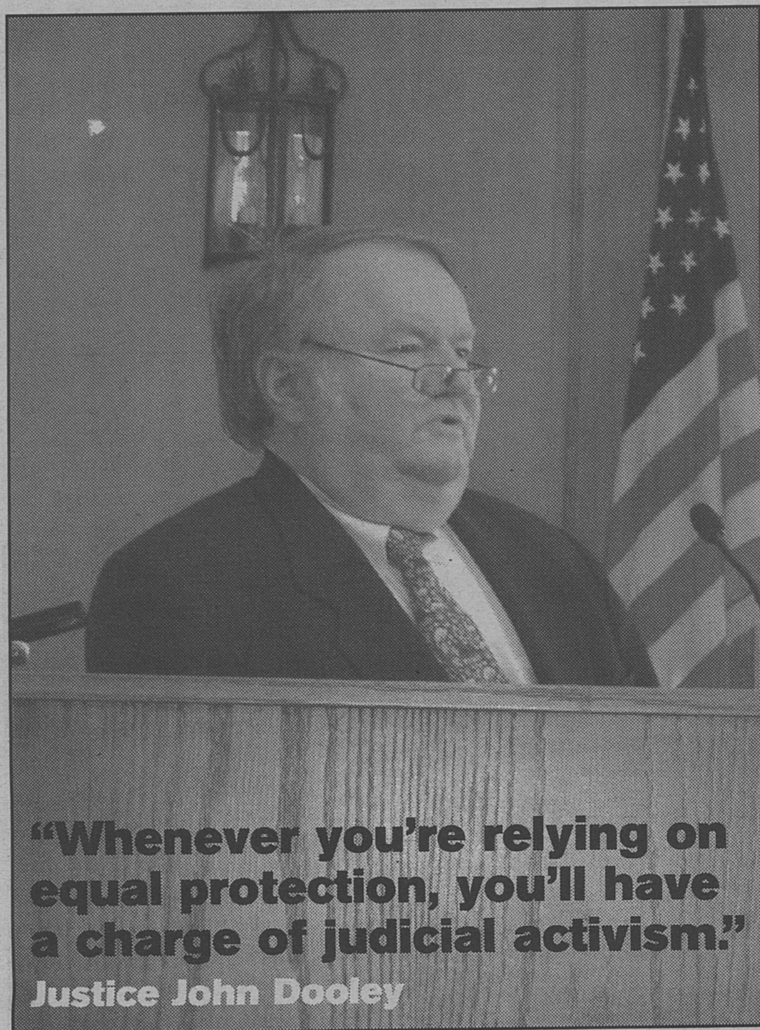


# It's About Sex: Justice John Dooley and Judicial Activism

Burlington – Vermont Supreme Court Justice John Dooley did a lawyerly review of definitions of judicial activism, his topic at an ethics symposium at the University of Vermont in mid-April. He looked at five categories of definitions and rejected them all, although some might have a grain of truth in them, he suggested.

Then he revealed what he really thought politicians mean when they sling the term at sitting judges: "First, it's about sex," the justice said to the audience's quiet but knowing laughter.

Dooley had said he would relate the question of judicial activism to the *Baker v. State* decision, which required Vermont to afford all the benefits of marriage to same-sex couples, and to the United States Supreme Court's ruling in *Lawrence v. Texas*, which struck down that state's sodomy laws (see "Blind Justice" in the April 2003 issue and "We Won!" in the August 2003 issue of *OITM* for background on *Lawrence*).

The five charges or indicators Dooley found in a database search (5000 hits on "judicial activism") included: striking down a law adopted by a legislature; ignoring precedent; legislating from the bench; departing from accepted judicial methodology; and issuing a results-oriented ruling.

Dooley argued that neither the *Baker* decision nor the *Lawrence* decision of the U.S. Supreme Court met these criteria, or if they did, the charge of judicial activism was unwarranted. Striking down laws is part of the justice's job when they conflict with founding documents, for example. And the *Baker* ruling, he said, was "certainly not" results-oriented, or the court would not have turned the matter back to the legislature to address. For the same reason, it did not qualify as "legislating from the bench."

The justice defended the judicial process the *Baker* court used as one that was clearly set out 25 years ago by Justice Hayes in *State v. Jewett*: considering what the Vermont constitution says, the text of the law and the history of its creation, whether other states have laws with similar language, and the historical and sociological environment.

And, he said, as far as "ignoring precedent," in the *Baker* case, "there was no precedent to ignore." The *Lawrence* ruling did not "ignore" precedent, it explicitly overturned it by repudiating the previous ruling on privacy and sexual acts between consenting adults of the same sex in *Bowers v. Hardwick*.

The three things that charges of judicial activism are really about, Dooley said, are sex (the culture wars, often involving religious views of sex); equal protection and substantive due process; and whether you think the decision is right or wrong.

The founders, he added, "didn't write much about sex in the Constitution: liberty, equality, yes, but not much about sex. If you take sex and add the culture wars, it adds to the likelihood that [a given ruling] will be labeled judicial activism."

Supporting his second point, Dooley said, "Whenever you're relying on equal protection, you'll have a charge of judicial activism." Equal protection and due process rights are based on the 14th Amendment, and "there's not a lot of content in there." Vermont's Common Benefits clause, on which the *Baker* decision was based, "is equivalent to the equal protection clause. We're dealing here with a document from 1777. It expresses a view of equality very different from ours, one in reaction to royal privilege. We are interpreting texts that are incredibly old, archaic, vague, and broad."

His final point would seem to be self-explanatory, that charges of judicial activism arise when someone thinks the decision is wrong. "Thank God for Tom DeLay," Dooley said to laughter from the audience. "It's just that he makes this point very clear." The reference was to the Terry Schiavo case in Florida, and Congress's passage of a federal bill that applied solely to her case and directed the federal courts to start the case over from scratch. The federal judiciary refused to rehear the case. Dooley summarized DeLay's commentary this way: "'We told you what to do, you didn't do it, and now there'll be hell to pay.'"

He disputed the charge that judges "want vague language" so they can impose their own values. "That's wrong," he said. "We need to modernize our constitution. Vermont's is the oldest, least amended, and shortest among the state constitutions. More recent constitutions are more progressive."

He acknowledged that opening the founding document to change could be "scary," since "all of a sudden you've got somebody wanting to use it to define marriage." But he insisted that the justices' job would be easier if amending and modernizing the state's constitution were not "nearly impossible" as he said it is in Vermont. "Give me a better document." ▼

# Taking the House: NH Medicaid Rules Threaten Gay Survivors

Concord, NH – According to a press release from the New Hampshire Freedom to Marry Coalition, HB691 (the Granite Care Bill) would revise the Medicaid program and allow the state to seize property (including a house) held in "joint tenancy with rights of survivorship, tenancy in common, life estate, living trust or other arrangement" of a person's estate.

Paragraph 9 of the bill allows the seizure in order to reimburse the state for Medicaid expenses incurred by the decedent.

The survivor of a same-sex couple could be in jeopardy of losing his or her home because of Medicaid bills. A legally married spouse is exempt from such Medicaid claims. Unless amended, the provision allows just 45 days after the death of a loved one before state action.

The bill also contains a provision that makes all transfers of property for less than full market value, looking back five years, subject to claim. The "look back" for trusts is 10 years.

HB691 also exempts from the state's Medicaid reimbursement claims not only legally married spouses but also those who purchase three years of long-term care insurance.

The bill was due to come to the floor in its amended form at press time. The NH Freedom to Marry Coalition was seeking to mobilize members and allies to get the bill changed. ▼