United States Senate

Republican Policy Committee

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Same-Sex Marriages Legal in Massachusetts on May 17

Judicial Activism Forces Same-Sex Marriage on the Nation

A 4-3 majority of the Supreme Judicial Court of Massachusetts ruled last November in *Goodridge v. Massachusetts Dep't of Health*, 798 N.E. 2d 941 (Mass. 2003), that the state's refusal to issue marriage licenses to same-sex couples violated the state constitution. The court concluded that to insist on traditional marriage was to engage in "invidious" discrimination that the court would not tolerate. The majority, therefore, ruled that marriage must be open to same-sex couples, and delayed the decision for 180 days so that the state legislature could pass laws it "deemed necessary" in light of the decision. (*Id.* at 969-970.)

In response, the Massachusetts Senate crafted legislation to provide all the protections, benefits, and obligations of marriage to same-sex couples, but created a new parallel institution called "civil unions." This legislation would preserve traditional marriage while granting virtually all the legal benefits of marriage to same-sex couples. Because of ambiguities in the original *Goodridge* decision, the state Senate then asked the high court for its constitutional opinion of the proposed law — would civil unions that provided *all* the rights, duties, obligations, and privileges of marriage to same-sex couples satisfy the court?

The court's answer, released on February 3, was an emphatic "no." The same four-judge majority declared it would not tolerate a parallel system of "civil unions" (akin to what exists in Vermont), even though the legal arrangement would be identical to marriage itself. Thus, without any vote of the legislature or the citizens themselves, the core of the marital institution — that it shall be a union of a man and a woman — will be eliminated in Massachusetts. The only remedy the citizens of Massachusetts have for this judicial activism is a constitutional amendment process that can be completed no earlier than 2006. In the meantime, same-sex marriage licenses are expected to be issued in Massachusetts beginning on May 17.

The Massachusetts Court's Rejection of Traditional Marriage

The *Goodridge* court last November court held that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a

person of the same sex violates the Massachusetts Constitution." (798 N.E. 2d at 969.) Particular highlights from the decision follow (with all emphasis added).

- Barring same-sex civil marriage "works a deep and scarring hardship on a very real segment of the community **for no rational reason**." (*Id.* at 968.)

- Support for traditional marriage "is rooted in **persistent prejudices** against persons who are (or who are believed to be) homosexual." (*Id.*)

- There is "**no rational relationship** between the marriage statute and the Commonwealth's proffered goal of protecting the 'optimal' child-rearing unit." (*Id.* at 962.)

- "Civil marriage is an **evolving paradigm**" subject to redefinition by courts. (*Id.* at 967.)

- Defenders of traditional marriage failed "to identify **any relevant characteristic** that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex." (*Id.* at 968.)

- "[I]t is **circular reasoning**, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." (*Id.* at 961 n.23.)

- The court's role is to **limit the influence of "historical, cultural, [and] religious … reasons**" that the State may rely upon in attempting to preserve traditional marriage. (*Id.* at 965 n.29.)

- "The continuous maintenance of this **caste-like system** is irreconcilable with, indeed, totally repugnant to the State's strong interest in the welfare of all children and its primary focus, in the context of family law where children are concerned, on 'the best interests of the child.'" (*Id.* at 972 (Greaney, J., concurring).)

- To note the long history of traditional marriage is to rely on nothing more than a **"mantra of tradition."** (*Id.* at 973 (Greaney, J., concurring).)

Three justices dissented from the decision, arguing that only the state legislature has the authority to make such a dramatic change to the civil marriage institution, and lamenting the majority's claim that the State's opposition to same-sex marriage was irrational.

- "It is surely pertinent to the inquiry to recognize that this proffered change affects not just a load-bearing wall of our social structure but the very cornerstone of that structure." (*Id.* at 981 (Sosman, J., dissenting).)

- The majority stripped the elected representatives of their right to evaluate the "consequences of that alteration, [and] to make sure that it can be done

safely, without either temporary or lasting damage to the structural integrity of the entire edifice." (*Id.* at 982 (Sosman, J., dissenting).)

- The majority justices instead imposed their will under the assumption "that there are no dangers and that it is safe to proceed, … an assumption that is not supported by anything more than the court's blind faith that it is so." (*Id.*)

The Court Insists on "Marriage" and Rejects a Civil Union Option

The Massachusetts Senate's subsequent drafting of a "civil unions" bill was designed to satisfy the court's edict while preserving traditional marriage. To ensure its constitutionality, the state Senate requested an advisory opinion from the Massachusetts court. Despite the fact that all legal rights and benefits were provided in the civil unions legislation, the court rejected this alternative legislation, insisting that marriage itself must be redefined. *Opinions of Justices to the Senate*, SJC 09163 (Feb. 3, 2004), available at www.state.ma.us/courts/opinionstothesenate.pdf. Highlights from that decision follow.

- The proposed law granting all the rights, benefits, and privileges of marriage through "civil unions" suffers from "**defects in rationality**." (*Id.* at 8.)

- "For **no rational reason**, the marriage laws of the Commonwealth discriminate against a defined class; **no amount of tinkering with language can eradicate that stain**." (*Id.* at 11.)

- "The bill would have the effect of maintaining and fostering a **stigma of exclusion** that the [Massachusetts] constitution prohibits." (*Id.* at 11.)

- Any attempt to preserve traditional marriage is little more than "**invidious discrimination**." (*Id.* at 10.)

- The court indicates that the elimination of civil marriage altogether is constitutionally preferable to the preservation of traditional marriage. (*Id.* at 11 n.4.)

In light of the court's refusal to entertain a solution that granted all benefits and privileges of marriage through civil unions, Massachusetts is expected to issue marriage licenses to same-sex couples on May 17, 2004.

How the Massachusetts Decision Affects Other States

Same-sex couples from across the United States intend to travel to Massachusetts this summer, marry, and then return to their home states to settle.[1] While Massachusetts law appears to prohibit the issuance of marriage licenses to non-resident same-sex couples who intend to return to

[1] The press reports that Massachusetts wedding planners and town clerks are fielding calls "from as far away as Alaska and Hawaii" from same-sex couples who intend to marry this summer in Massachusetts. Thomas Caywood, "Clerks getting pre-wedding jitters," *Boston Herald*, 6 Feb. 2004. See also articles discussing American same-sex couples marrying in Canada and returning to United States to live. *E.g.*, Sarah Robertson, "Mining the Gold in Gay Nuptials," *New York Times*, 19 Dec. 2003.

states where such "marriages" are illegal, see Mass. G.L. 207 §§ 11-13, the fate of that law is uncertain and press reports make clear that many non-Massachusetts citizens intend to marry there and return to their home states. And Massachusetts same-sex residents who marry there can, of course, later move to other states. In both instances, those same-sex couples may seek recognition of their Massachusetts marriages in other states so that they can receive all the privileges, benefits, and rights that each state gives to married couples.

These Massachusetts marriages will serve as the gateway to additional judicial activism throughout the United States. Some same-sex couples will ally themselves with homosexual-rights activists and challenge both provisions of federal DOMA (the "Defense of Marriage Act") — 1) the section that prevents same-sex married couples from accessing federal benefits such as joint tax filing privileges, Social Security spousal payments, and federal employee spousal eligibility, and 2) the section that bolsters the ability of states to refuse recognition of out-of-state same-sex marriages. Other activists will follow the Massachusetts model and demand that state supreme courts redefine marriage by judicial fiat, as plaintiffs have urged recently in New Jersey, Arizona, Indiana, Alaska, Hawaii, and Vermont.[2]

As these activist-driven state court cases are filed, they will confront resistance in the 38 states that have passed some form of a "State DOMA" that enshrines in state law support for traditional marriage.

States with "DOMAs"

(constitutional amendments marked with *)

Alabama	*Georgia*	*Louisiana*	*Nevada**	*Tennessee*
*Alaska**	*Hawaii**	*Maine*	*North Carolina*	*Texas*
Arizona	*Idaho*	*Michigan*	*North Dakota*	*Utah*
Arkansas	*Illinois*	*Minnesota*	*Ohio*	*Virginia*
California	*Indiana*	*Mississippi*	*Oklahoma*	*Washington*
Colorado	*Iowa*	*Missouri*	*Pennsylvania*	*West Virginia*
Delaware	*Kansas*	*Montana*	*South Carolina*	
Florida	*Kentucky*	*Nebraska**	*South Dakota*	

Only Alaska, Hawaii, Nebraska, and Nevada have state constitutional amendments that prevent a state supreme court from ruling these "State DOMAs" unconstitutional. And, of course, no State DOMA can prevent a federal court from striking down a state constitutional amendment under *federal* constitutional standards. (The Nebraska state constitutional amendment has been challenged in federal court and is now awaiting trial. *Citizens for Equal Protection, Inc. v. Bruning*, 290 F. Supp. 2d 1004 (2003).) So far, state court lawsuits are pending in Arizona, Indiana, and

[2] See *Lewis v. Harris*, No. MER-L-03, 2003 WL 2319114 (N.J. Super. L. Nov. 5, 2003) (denying plaintiffs' demand for marriage license; case now pending appeal); *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. App. 2003) (affirming denial of marriage license to plaintiffs; case pending petition to Arizona Supreme Court); *Morrison v. Stadler*, No. 49D13-0211-PL 001946 (Marion County (Indiana) Super. Ct.) (relief denied to plaintiff; on appeal to Indiana Court of Appeals); *Brause v. State, Dep't of Health*, 21 P.3d 357 (Alaska 2001) (affirming dismissal on mootness grounds due to state constitutional amendment barring same-sex marriage recognition); *Baehr v. Miike*, 1996 WL 694235 (Hawaii Cir. Ct. Dec. 3, 1996) (superseded by constitutional amendment); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (causing legislature to enact civil unions law).

New Jersey, each of which asks the state courts to rule that the state constitutional equal protection and/or due process provisions require imposition of same-sex marriage.

Many same-sex couples do not wish to be litigious, but it is inevitable that many of them will challenge state marriage laws through the regular course of living in their home states. For example, courts in Texas, Iowa, and New York have already confronted cases addressing the reach of Vermont civil unions in the case of "divorces" and the right to sue on behalf of a deceased "spouse."[3] Thus, while the conscious campaign for judicial imposition of same-sex marriage through the courts is well documented,[4] that campaign ultimately may pale in comparison to the opportunities for judicial activism that will arise when same-sex couples settle in states where their marriages are not recognized.

Conclusion

President Bush said in his State of the Union address, "If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process." That constitutional process begins when each house of Congress proposes a constitutional amendment and presents it to the American people for ratification through their state legislatures.[5] The recent judicial activism in Massachusetts, especially when seen in the context of the ongoing campaign in the courts, would certainly justify the Judiciary Committee holding hearings on the propriety of proposing an appropriate constitutional amendment. Ultimately, the future of marriage should be decided by the American people, not by activist courts.

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[3] The unpublished Texas decision relating to dissolution of a Vermont civil union (which was later reconsidered) is discussed at http://www.washtimes.com/national/20031215-110146-5298r.htm. The Iowa decision regarding the same, also reconsidered, is discussed at http://desmoinesregister.com/news/stories/c4788993/22995747.html. The full text of the New York decision regarding the right to sue as a surviving spouse if one is in a Vermont civil union is available at http://www.marriagewatch.org/cases/ny/langan/trial/sj_opinion.pdf.

[4] See, for example, Senate Republican Policy Committee, "The Threat to Marriage from the Courts" (July 29, 2003), available at http://rpc.senate.gov/releases/2003/jd072903.pdf.

[5] U.S. Constitution, art. V.