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The Massachusetts Court Goes for Broke: No Civil Unions

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Responding to the proposed legislation, the Court ruled that since the civil union legislation "forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status." Building on its decision in Goodridge, the Court ruled that "group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The history of our nation is demonstrated that separate is seldom, if ever, equal."

This ruling sent shock waves across the nation—ensuring that the issue of homosexual marriage will be on the front burner of the 2004 presidential election. The Supreme Judicial Court of Massachusetts, demonstrating the most brazen display of judicial activism, will force politicians and other national leaders to come out squarely either for or against same-sex marriage. The half-way house of civil unions has just been destroyed by judicial fiat.

The response from Massachusetts politicians was immediate. Governor Mitt Romney, a Republican opposed to gay marriage, seized the opportunity to declare that the people of his state should have the opportunity to decide the definition of marriage. "We heard from the court but not from the people. The people of Massachusetts should not be excluded from a decision as fundamental to our society as the definition of marriage."

The decision was handed down even as the state prepared for an historic constitutional convention, scheduled for February 11. At that convention, state legislators are to consider a proposed constitutional amendment that would define marriage as a relationship between a man and a woman and would prohibit the legal recognition of homosexual relationships. Many of those legislators are Democrats—and Roman Catholics—who will answer to a constituency very much opposed to homosexual marriage. Wednesday's decision will add great momentum to those favoring an amendment.

State Rep. Eugene O'Flaherty, chairman of the House Judiciary committee, said that in light of the Court's decision, he is virtually certain to vote for the amendment. Rep. O'Flaherty had been a backer of civil unions until the Court denied that option. Now, he is prepared to fight against homosexual marriage. At the other extreme, Massachusetts Attorney General Thomas Reilly, who had argued against same-sex marriage in the Goodridge case, responded to the Court's most recent ruling by advising that same-sex couples "have the constitutional right to marry under Massachusetts law."

In its most recent decision, the Massachusetts Court declared that “preserving the institution of civil marriage is of course a legislative priority of the highest order, and one to which the justices accord the General Court the greatest deference.” Of course, that language is betrayed by the fact that the Court’s decision effectively denies the legislature its power to preserve the institution of marriage. The decision combines radical ideology with the language of the civil rights movement. When it declared that civil unions would be unconstitutional, citing the “separate but equal” legacy of segregation, the Court put homosexual rights on par with racial discrimination.

Even as it demonstrated the worst excesses of judicial activism, the Court that insisted that its decision “is not a matter of social policy but constitutional interpretation.” As the decision argued, “the traditional, historic nature and meaning of civil marriage in Massachusetts is as a wholly secular and dynamic legal institution, the governmental aim of which is to encourage stable adult relationships for the good of the individual and of the community, especially its children.” So, claiming that their interest is only that of constitutional interpretation, the Court then plowed itself into territory the constitution does not even directly address. The framers of the state constitution of Massachusetts cannot possibly be interpreted to have intended the recognition of homosexual marriage. But that is of no concern to the four-judge majority of the Massachusetts Supreme Court.

By establishing that civil marriage is “a wholly secular and dynamic legal institution,” the Court offers a secularized vision of our most venerable institution and imposes a reduction on the entire concept of marriage itself.

Even though marriage has been understood throughout the millennia of human history as a heterosexual institution, and the relationship established between a husband and a wife, the Massachusetts court claims that the prohibition of same-sex marriage is based upon “group classifications based on unsupportable distinctions.” So, gender is reduced to an “unsupportable distinction” that has no legal standing in interpreting the Massachusetts Constitution.

The Court dismissed the very idea of civil unions, arguing that “the dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is considered a choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status...”

When the Massachusetts Supreme Court handed down its Goodridge decision last November, the Court “outed” itself as a rampart of radical legal theory. Given the sweeping character of that activist decision, the Court would have to work hard to reach yet a new level of activist overreach. Nevertheless, it accomplished that achievement on Wednesday. This most recent decision pushes the question of same-sex marriage on to the national agenda—and in a hurry.

Conservatives are rightly outraged at this further demonstration of judicial activism. Nevertheless, the Massachusetts Supreme Judicial Court—in spite of its own intentions, has actually helped to clarify the issues at stake. The very idea of “civil unions” allows tepid and temporizing politicians to find refuge in a half-way house of legislative imagination. Furthermore, the imposition of civil union laws would not have produced the same conservative opposition and popular outrage that will be faced when homosexual marriage is imposed upon the people of Massachusetts and the nation.

The politicians of Massachusetts are not the only political figures on the hot seat. Democratic presidential front runner Sen. John Kerry, who has sought to assure the base of the Democratic party of his support for homosexual rights, has tried to avoid supporting gay marriage by calling for civil unions. Now, the Supreme Judicial Court of his own state has sent a torpedo through his campaign’s flagship. Now, Kerry will be forced to come out in either in favor of the Court’s decision, or of the constitutional amendment that would correct the Court’s error. This is a political vise Kerry had struggled hard to avoid.

Former Vermont Gov. Howard Dean, who continues to receive media attention even as he falls precipitously in the polls, declared that any state’s decision on the issue of same-sex marriage is “none of the federal government’s business.” Dean, who signed the nation’s first civil union legislation, has nothing to lose by pressing this case.

President Bush, who affirmed marriage as a heterosexual institution in his recent State of the Union address, and warned that an activist judiciary could force the constitutional amendment process, released a statement Wednesday. The President set the issue clearly before the public: “Marriage is a sacred institution between a man and a woman. If activist judges insist on redefining marriage by court order, the only alternative will be the constitutional process. We must do what is legally necessary to defend the sanctity of marriage.”

Even as the Massachusetts court handed down its decision, a group of conservative leaders were meeting with White House advisors to call for the White House to take a leadership role in pushing for a constitutional amendment. The Massachusetts Supreme Court spoke far more persuasively than the conservatives could have spoken for themselves. Those who honor and would protect the institution of marriage must quickly coalesce around a specific proposal for protecting marriage in the Constitution. The Federal Marriage Amendment must become a top priority for the Bush administration and for all who would defend the institution of marriage—even as it is being destroyed before our eyes.

An article published in Thursday's edition of the Washington Post explained that the Massachusetts court's decision "has virtually guaranteed that the issue will be a wedge in this year's political campaigns." That statement is likely to go down as one of the great understatements of the year. Until Wednesday, the issue of same-sex marriage may have been a "wedge" in this year's political campaigns. After Wednesday, the issue is more like a bomb. When the smoke clears, this culture's understanding of marriage will have been either saved or destroyed.

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