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Marriage Must Be Protected from the Judges

Time to Rebuke Judicial Oligarchy

Will Massachusetts, the cradle of American liberty, let four lawyers don the robes of oligarchy, override the wishes of the majority of the people, usurp the powers of their elected representatives, and sabotage the institution of marriage? Where is the zeal for a fight that manifested itself in Massachusetts men at the battles of Bunker Hill, Lexington and Concord?

The Massachusetts Supreme Judicial Court ruled 4-to-3 to legalize same-sex marriages in the case called *Goodridge v. Dept. of Public Health*. With elitist arrogance, the slim four-person majority bragged: "Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries."

Indeed, it does. Traditional marriage of husband and wife is fortified by a network of legal rights and duties spelled out in over a thousand federal and 400 state laws. The four judges gave the governor and the legislature 180 days to overturn nearly 400 years of Massachusetts history and law.

Those judges had no authority to change the definition of marriage. They looked inward and convinced themselves that they alone could change social policy and make new law, and they even contemptuously opined that belief in traditional marriage is without a "rational basis." The people of Massachusetts should tell the judges to stuff their arrogance. "We the people" should rise up and say we are not going to kowtow to judicial tyranny.

Regrettably, the response by Massachusetts public officials has been pusillanimous. They are groveling before the four judges in the hope they might be appeased by a parallel system of civil unions.

Governor Mitt Romney is trying to walk a tight rope of compromise. While supporting a constitutional amendment to protect traditional marriage, he said: "We obviously have to follow the law as provided by the Supreme Judicial Court, even if we don't agree with it," and we need to decide "what kind of statute we can fashion which is consistent with the law." But what "law"? There is no law that requires or even allows same-sex marriages. The judges enunciated only special-interest advocacy masquerading as legal reasoning.

Attorney General Thomas F. Reilly said the judges overstepped in trying to shape social policy, but he wants to test an alternative solution and then seek "an advisory opinion of the court." *Au contraire*; we don't want any more advice from those judges.

State Representative Philip Travis, the lead sponsor of an amendment to preserve the definition of marriage, has the right response. He said that if the legislature doesn't act within the 180 days, the court can't force clerks to issue marriage licenses to gay couples.

"When we pass 180 days, what are you going to do to the Legislature?" said Travis. "With all due respect to the Supreme Court . . . you've given us a decision and given it to us to enforce. Therefore, if we don't enforce it, there is no remedy under the law of Massachusetts."

This Massachusetts court decision isn't just about same-sex marriage. It has posed the question whether Americans are willing to submit to what Thomas Jefferson predicted would be "the despotism of an oligarchy" if judges are allowed to be "the ultimate arbiters of all constitutional questions."

All over the nation, special-interest advocacy groups are "forum shopping" to find friendly judges willing to bypass the Constitution and write their own social and sexual preferences into the law. Plaintiffs are seeking out judges who are willing to cooperate in deconstructing our culture by abolishing the Pledge of Allegiance and the Ten Commandments to make the nation comfortable for atheists, and to abolish marriage requirements to make the nation comfortable for unrestricted sex.

Gay rights activists have a nationwide strategy to make same-sex marriage a constitutional right. The legal advocacy firm called Freedom to Marry is joined in this effort by the Gay & Lesbian Advocates & Defenders, the American Civil Liberties Union, Lambda Legal, NOW Legal Defense and Education Fund, and Human Rights Watch.

They plan to accomplish in the courts what they cannot win in elected legislatures. Activist lawyers will litigate to get other state courts to use Massachusetts as a model, and the gays who marry in Massachusetts will seek legal recognition in other states, challenging their marriage laws and state Defense of Marriage Acts (DOMA).

The same-sex-marriage activists know that the legal profession is predisposed to redefine marriage. The dissenting justices in *Lawrence v. Texas* (the 2003 decision that voided the Texas sodomy law) warned that the Supreme Court is imbued with the "law profession's anti-anti-homosexual culture."

The dissenting judges in the Massachusetts same-sex marriage case laid it on the line: "What is at stake in this case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts. . . . The power to regulate marriage lies with the Legislature, not with the judiciary."

Massachusetts citizens should slap down their high court as the citizens of Hawaii and Alaska did when confronted with the same judicial impudence, and a nationwide backlash against judicial activism should start to roll.

We Must Protect Marriage Now!

Since the Massachusetts Supreme Court ruled in favor of same-sex marriages in *Goodridge v. Dept. of Public Health*, reporters have been asking presidential candidates for their comment. Their unresponsive answers reveal their hope that the issue will recede before the 2004 elections.

But the issue won't go away, and every candidate might as well get prepared with a coherent answer. The gay rights lobby smells political victory, and the majority of Americans are digging in to protect a fundamental prop of civilization.

Whining about discrimination, the gay lobby is trying to position the Massachusetts ruling as a logical expansion of the civil rights movement. It isn't.

No one has the right to marry whomever he wants, and gays can already get marriage licenses on exactly the same terms as anyone else. Everyone is equally barred from marrying another person who is under a certain age, or too closely related, or of the same gender, or already married to another. Sound reasons underlie all these requirements, which apply equally to everyone, male and female.

Goodridge is the anticipated consequence of this year's U.S. Supreme Court decision in *Lawrence v. Texas*. As Justice Scalia said in dissent, *Lawrence* "is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda."

The Massachusetts Supreme Court for a decade has been itching to implement the gay rights agenda. It was the second state supreme court to rule that a lesbian could adopt the biological daughter of her partner, and the first to grant visitation rights to a gay woman who had helped raise her former partner's child.

The media are now accelerating their spin for same-sex marriage even though the Pew survey shows that opposition to same-sex marriage has increased to 59% since the *Lawrence* decision. The *New York Times* (11-23-03) is exulting that "the United States is becoming a post-marital society," creating "new forms of semi-marriages," blurring the lines between marriage and cohabitation, and imitating European types of "Marriage Lite."

Rejecting the claim that the primary purpose of marriage is procreation, the Massachusetts judges pontificated that the history of marriage demonstrates that "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of marriage." But that argument doesn't justify the court's decision because same-sex relationships are neither exclusive nor permanent.

A recent study of young Dutch homosexual men (reported in the journal *AIDS* and in the *Washington Times*, 7-14-03) found that their relationships, on average, last only one and a half years. The 1984 McWhirter-Mattison study reported in *The Male Couple* that homosexual couples with relationships lasting more than five years incorporated a provision for outside sexual activity.

Traditional marriage is based on the beautiful words "To have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, forsaking all others, to love and to cherish, till death do us part."

After Canada legalized same-sex marriage, there was no rush down the aisle to the altar. Out of 34,200 self-identified homosexual couples, only 1.4% obtained marriage licenses. (*New York Times*, 9-1-03) The editor of *Fab*, a popular gay magazine in Toronto, explained, "I'd be for marriage if I thought gay people would challenge and change the institution and not buy into the traditional meaning of 'till death do us part' and monogamy forever."

Gays already have the liberty to live their lives as they choose, set up housekeeping, share income and expenses, make contracts and wills, and transfer property. What they are now demanding is respect and social standing for a lifestyle that others believe is immoral (like mixed-gender cohabiting). That amounts to the minority forcing its views on the majority. Nobody is entitled to respect for behavior of which we don't approve.

Legalizing same-sex marriage would not merely permit a small number of people to choose alternate lifestyles (they are already doing that). It would force the rest of us to accept a public judgment that personal desire outweighs the value of traditional marriage and outweighs the need of children for mothers and fathers.

If personal desire is to become the only criterion for public recognition of marriage, if equal rights and nondiscrimination require us to be neutral about who is eligible for marriage, how then can we deny marriage to those who want to marry a child, or a sibling, or more than one wife? All those practices are common in some other countries.

If a 13-year-old girl can exercise "choice" to "control her own body" and get an abortion, why can't she have the choice to marry? The *Goodridge* decision ruled that "the right to marry means little if it does not include the right to marry the person of one's choice."

Marriage must not be changed to mean merely two consenting persons agreeing to share quarters and start applying to the government and to employers for economic benefits. Marriage must continue to be recognized as the essential unit of a stable society wherein husbands and wives provide a home and role models for the rearing of children.

The Anti-Marriage Campaign

When the famous French commentator Alexis de Toqueville traveled the United States in the mid-19th century, he recognized that respect for marriage is very American. He wrote: "There is certainly no country in the world where the tie of marriage is more respected than in America, or where conjugal happiness is more highly or worthily appreciated. . . . While the European endeavors to forget his domestic troubles by agitating society, the American derives from his own home that love of order which he afterwards carries with him into public affairs."

All social statistics confirm that traditional marriage is good for women, good for men, good for children, and good for society. The alarming results of broken marriages are all around us. Contrary to the Massachusetts decision, there is indeed a "rational basis" for the unanimous decision of all 50 state legislatures throughout our entire American history that marriage should be publicly recognized as the union of a husband and wife. The American people and our elected representatives most certainly have a rational basis for concluding that marriage is a social good to be protected and encouraged.

A persistent attack on the institution of marriage has been going on in America ever since no-fault divorce swept state legislatures in the 1970s. Those were the days when the buzz word of the feminist movement was "liberation," and that word signified liberation from home, husband, family and children. The big mama of the feminist movement and author of *The Second Sex*, Simone de Beauvoir, labeled marriage "an obscene bourgeois institution," and her American counterpart, Betty Friedan, called the home a "comfortable concentration camp."

The alternate-lifestyle advocates successfully persuaded President Jimmy Carter in 1980 to pluralize the name of his White House Conference on Families in order to popularize the feminist and gay notion that different kinds of families should be recognized.

The anti-marriage network fanned out in state after state to repeal the laws designed to honor morality and preserve marriage, such as the laws requiring a husband to support his wife and the laws forbidding adultery, fornication, sodomy, and alienation of affection.

Meanwhile, under LBJ's Great Society, the welfare system channeled massive amounts of welfare money through mothers, making the husband and father irrelevant to the family's economic well-being. It should come as no surprise that this encouraged illegitimacy and single-parent households.

Since the 1970s, the media have carried on a steady drumbeat to promote the belief that we have moved into an era of serial (rather than lifetime) marriages. "Ozzie and Harriet," a sitcom featuring a traditional family, became a favorite feminist epithet.

Earlier this year, a broadside attack on the institution of marriage was launched by the American Law Institute (ALI), an association of liberal lawyers and academics who write model laws and try to bamboozle state legislatures into passing them. The American Law Institute has no official authority whatsoever, but unfortunately it has had much influence on the writing of our laws.

This ALI proposal would give the rights and privileges of married couples to any sexual roommates, whether they are same-sex or traditional couples, including the rights of child custody, child support, and alimony. It would set up a system for distributing marital property "without regard to marital misconduct." A man could be compelled to pay alimony after breaking up with a live-in girlfriend. The ALI proposal would change our laws to forbid judges from taking note of homosexual conduct, adultery, or other immoral actions or relationships in awarding divorce, alimony or child custody. State legislators should be alerted to reject all this anti-marriage legislation.

The ALI proposals are part of a long-running campaign to persuade the courts that "rights" should have nothing to do with morality. This line runs through most activist court decisions. Thus, *Goodridge v. Dept. of Public Health* quotes *Lawrence v. Texas* which quotes *Planned Parenthood v. Casey* in stating: "Our obligation is to define the liberty of all, not to mandate our own moral code." But in rejecting any moral code, the judiciary in fact is mandating public approval of an immoral code. No wonder some activist judges want to obliterate the Ten Commandments!

ERA and Same-Sex Marriage

The majority opinion in *Goodridge* was conveniently vague about how the Massachusetts Constitution could justify this decision, but since the Massachusetts Constitution was adopted in 1780, and written by John Adams, it is absurd to believe that its equality language could have

included same-sex marriage.

The concurring opinion in *Goodridge v. Dept. of Public Health* cited the Massachusetts state Equal Rights Amendment as authority to legalize same-sex marriages. The state ERA was added to Article 1 of the Massachusetts Constitution in 1976. It provides: "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

Judge Cordy's dissent (joined by both other dissenting judges) reminded the court that just before the 1976 election when the voters adopted the state ERA, the official Massachusetts commission, which was charged with the duty of advising the voters what ERA's effect would be, issued this statement: "An equal rights amendment will have no effect upon the allowance or denial of homosexual marriages. The equal rights amendment is not concerned with the relationship of two persons of the same sex; it only addresses those laws or public-related actions which treat persons of opposite sexes differently."

Boston newspapers echoed this disclaimer, labeling claims that the ERA would be the basis for same-sex marriage as "exaggerated" and "unfounded." Editorializing for ERA, the *Boston Globe* noted that "those urging a no vote . . . argue that the amendment would . . . legitimize marriage between people of the same sex. In reality, the proposed amendment would require none of these things."

The *Goodridge* decision did use the Massachusetts ERA to legalize marriage between people of the same sex. This caused UCLA law professor Eugene Volokh to post on his website: "Phyllis Schlafly said it would be like this." He cited typical examples from the liberal press ridiculing the opponents of ERA for "canards," "scare tactics," and "hysterics" in predicting that ERA would require same-sex marriage.

U.S. News & World Report (4-28-75): "Opponents, for example, suggested passage of ERA would mean abortion on demand, legalization of homosexual marriages, sex-integrated prisons and reform schools — all claims that were hotly denied by ERA supporters."

New York Times (7-5-81): "Discussion of [the ERA] bogged down in hysterical claims that the amendment would eliminate privacy in bathrooms, encourage homosexual marriage, put women in the trenches and deprive housewives of their husbands' support."

Washington Post (2-19-82): "The vote in Virginia [against the ERA] came after proponents argued on behalf of civil rights for women and opponents trotted out the old canards about homosexual marriages and unisex restrooms."

Volokh concluded: "So the Massachusetts ERA did contribute to constitutional protection for homosexual marriage — as the opponents of the ERA predicted, and as the supporters of the ERA vehemently denied."

Protecting Marriage Is Our Duty

The American people of all faiths and parties must join together to defeat the anti-marriage movement and its attempt to change the definition of marriage to include any type of sexual cohabitation.

State legislators and public officials must refuse to enforce court rulings as "law." Only elected representatives can make law. They should echo the famous remark of President Andrew Jackson about a Supreme Court ruling he believed was wrong: "[Chief Justice] John Marshall has made his decision; now let him enforce it."

The legislatures of Massachusetts and Vermont (and any other state suffering from activist judges) must nullify, repeal or revoke any court's redefinition of marriage. This is what the people of Hawaii and Alaska did after their state courts used ERA to legalize same-sex marriage. After the Hawaii supreme court ruled that the denial of marriage licenses to same-sex couples is sex discrimination and unconstitutional under Hawaii's State ERA (*Baehr v. Lewin*, 852 P.2d 44, 1993), Hawaii passed another constitutional amendment to overturn that decision. What Hawaii and Alaska did, other states can do, too.

The Defense of Marriage Act (DOMA), passed by Congress with big majorities in 1996 and signed by President Bill Clinton, does two things. (1) In everything that is touched by federal law, marriage must be defined as a legal union of one man and one woman as husband and wife. (2) Using the Full Faith and Credit provision of the U.S. Constitution's Article IV, Congress prescribed that no state can be forced to accept another state's law or proceeding that treats a same-sex relationship as marriage.

DOMA is a splendid law, but pressure groups are threatening to file suit to declare this law unconstitutional, and no one can predict what some pro-gay activist federal judge might do. Therefore, Congress should pass a third section to DOMA withdrawing jurisdiction from all federal courts to hear any challenge to DOMA.

Article III, Sections 1 and 2, of the U.S. Constitution give Congress ample power to limit and regulate the jurisdiction of the federal courts to hear any challenge to DOMA, and to make DOMA an "exception" to the types of cases that the Supreme Court can decide. We cannot permit the federal courts to cooperate in the pressure groups' demands to legalize same-sex marriage.

We should pass an amendment to the United States Constitution to establish once and for all that marriage is defined as the union of a man and a woman as husband and wife, and that no court has any power to rule otherwise.

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