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Today Massachusetts, Tomorrow... ?

Branch breakdown in the Bay State.

By William C. Duncan

Today the Commonwealth of Massachusetts joins the Netherlands, Belgium, and some Canadian provinces in redefining marriage by issuing licenses to same-sex couples. How did Massachusetts come to this point?

The obvious answer is that it does so under court order — the November 2003 decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*. After a near-but-not-quite-complete victory in a same-sex-marriage lawsuit in Vermont in 1999 — which resulted in the legislature's court-ordered creation of a civil-union status providing same-sex couples all the benefits of marriage — one of the lawyers for the Vermont plaintiffs brought a similar suit in Massachusetts on behalf of seven same-sex couples.

The hallmarks of the litigation included: (1) choosing sympathetic couples as plaintiffs, (2) bringing the suit in a jurisdiction where the legal culture evidenced a predisposition to accept novel constitutional claims, and (3) scrupulously avoiding federal arguments to ensure that federal officials could not affect the outcome.

The strategy paid off. When a divided (5-4) court issued its decision, the majority could not have embraced the plaintiffs' claims more enthusiastically. Relying on a hodge-podge of legal theories and liberally citing nebulous passages in U.S. Supreme Court cases (such as the recently decided *Lawrence v. Texas*), the majority concluded that Massachusetts' marriage law was "rooted in persistent prejudices against persons who are (or who are believed to be) homosexual." Thus, the court took it upon itself to create a new definition of marriage: "the voluntary union of two persons as spouses, to the exclusion of all others."

That decision, however, is not the whole story. Indeed, without the complicity of the Massachusetts legislature, Massachusetts might not now be issuing marriage licenses to same-sex couples. Or if it had, the effort might have been short lived.

In 2001, a citizen coalition gathered 76,607 certified signatures (57,100 were needed) to place before the Massachusetts legislature a proposed constitutional amendment that, if passed, would have defined marriage as the union of a man and a woman and prevented the creation of a marriage equivalent. In order to be placed on the ballot, the measure needed to gain the support of 25 percent of legislators in two successive sessions. Evidencing a fear of the popular vote that bordered on "demographobia," the *Goodridge* lawyers lobbied the attorney general and filed suit to prevent the legislature from considering the proposed amendment.

They need not have made the effort. The senate president ensured that the bill would not get a vote by simply ending the constitutional convention before such a vote could be taken. (The

Supreme Judicial Court ruled that this violated the Massachusetts constitution, which calls for "final action" on initiative proposals.) If the legislature had voted at that time, the measure could have been on the November 2004 ballot.

After *Goodridge*, the legislature could no longer duck responsibility, but their response was far from robust. Seizing on perceived ambiguity in the opinion, the new senate president proposed a civil-union law, but dutifully sent his proposal to the court for input before allowing legislators to vote on the idea. The court promptly rejected the proposal, invoking the specter of "separate but equal."

Almost three months after the *Goodridge* opinion was issued, the legislature finally met in constitutional convention to consider a proposed amendment (introduced more than a year before) that would have forcefully responded to the court by defining marriage and preventing civil unions. Alas, the people of Massachusetts were not to be given an opportunity to weigh in on the court's dictate. After much wrangling, a substitute proposal offered by the senate leadership was approved. While defining marriage as the union of a man and a woman, the proposal also contained a poison pill: the simultaneous creation of an identical civil-union status for same-sex couples. The court's challenge went unanswered.

Governor Mitt Romney made some efforts to counteract the court. When the legislature approved an amendment, he asked the attorney general to petition the court to stay its decision until the amendment could be submitted to the popular vote. The attorney general refused, and the legislature would not act on the governor's subsequent request for the appointment of a special counsel to pursue the option.

Last week, two attempts to prevent the state from issuing marriage licenses to same-sex couples in state and federal court failed. The second — based on the argument that unchecked judicial rule deprives Massachusetts citizens of the U.S. Constitution's guarantee of a republican government — was not expected to prevail. However, it contains an important kernel of truth, because the current situation in Massachusetts is clearly attributable to a breakdown in the respective roles of government branches (i.e., legislators meekly asking permission of the court before attempting to enact legislation contrary to the will of five judges).

The irony is that the Massachusetts constitution contains a powerfully succinct formulation of the principle of the rule of law, including this statement: "the judicial [branch] shall never exercise the legislative and executive powers...to the end it may be a government of laws and not of men."

This year, the legislatures of five states have approved proposed marriage amendments for the November 2004 ballot. This will circumvent the attempts of courts in those states to follow the Massachusetts Supreme Judicial Court's lead. Ultimately their most important contribution may be to bolster a federal marriage amendment that would prevent any court, state or federal, from redefining marriage in the future. Whether such an amendment will be successful may very well depend on how the people of the United States respond to today's events in Massachusetts.

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