

Judges Redefine Marriage

THE DEFINITION OF MARRIAGE as the union of a man and woman as husband and wife has prevailed throughout our legal history. Gay activists have been eager for years to get the government to issue marriage licenses to same-sex couples. Unable to persuade the American people, the gay lobby has sought out activist judges to assert judicial supremacy.

The gays achieved their first victory in Hawaii. In 1993, the Hawaii state supreme court ruled that the denial of marriage licenses to same sex couples was discriminatory and unconstitutional under Hawaii's state Equal Rights Amendment, which mandates "equality . . . on account of sex." The people of Hawaii then rebuked the court, passing a constitutional amendment in 1998 to overturn the *Baehr v. Lewin* decision. A similar decision was rendered by a lower court in Alaska in 1998, and that decision was overturned by a state constitutional amendment that same year.

The next move was in Vermont in 1999, where the state supreme court ordered the state legislature to grant all the benefits and privileges of marriage to same-sex couples. The Vermont state legislature should not have allowed the court to tell it what statute to pass, but it did, and in 2000 Vermont governor Howard Dean signed the nation's first "civil union" law.

On November 18, 2003, Massachusetts judges shocked the nation. It's hard to find a more outrageous example of activist judges asserting judicial supremacy than the 4 to 3 decision in *Goodridge v. Department of Public Health* by the Massachusetts supreme court mandating same-sex marriage licenses. The Massachusetts state constitution was written by John Adams and adopted in 1780, and any notion that it was intended to include same-sex marriage is absurd. 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. The Massachusetts court even issued a special advisory opinion telling the legislature what sort of marriage law to pass (*Opinions of the Justices to the Senate*, February 3, 2004).

After acknowledging that for three centuries Massachusetts defined civil marriage as stated in Black's Law Dictionary—"the legal union of a man and woman as husband and wife"—the Massachusetts judicial supremacists declared that there is no "rational basis" for that definition, and ordered this new definition of marriage: "We construe

civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.”

Contrary to the Massachusetts decision, there is indeed a “rational basis” for the unanimity of the state and federal legislatures throughout American history that marriage should be publicly recognized as the union of a husband and a wife. The American people and our elected representatives have concluded that marriage is a moral good to be protected and encouraged. All social science statistics confirm that traditional marriage is good for women, good for men, good for children, and good for society.

Massachusetts judges had no authority to change the definition of marriage. They simply convinced themselves that they alone could change social policy and make new law. They did no analysis of the consequences of the social policy they mandated.

The dissenting judges in the Massachusetts same-sex marriage case understood that judicial supremacy was the underlying offense in this shocking decision: “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.”

A concurring opinion in *Goodridge v. Department of Public Health* cited the Massachusetts state Equal Rights Amendment as one authority for the decision to legalize same-sex marriages. The state ERA was added as Article CVI of the Massachusetts Constitution in 1976. It provides that

“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 charged with the duty of advising the voters about ERA’s effect 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.”

The *Goodridge* decision’s partial reliance on the Massachusetts ERA to legalize marriage between people of the same sex caused UCLA law professor Eugene Volokh to post on his website: “Phyllis Schlafly said it would be like this.” 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.”

It is fortunate that the proposed *federal* Equal Rights Amendment was defeated in a ten-year legislative battle, from 1972 to 1982. The word used in the Amendment was “sex” (not women, as many were falsely led to believe), so the ERA if ratified would have given the mantle of the U.S. Constitution to same-sex marriages.

The Massachusetts case is part of a national gay rights strategy to make same-sex marriage a new constitutional right. The legal advocacy firm called Freedom to Marry

is joined in this effort by the Gay & Lesbian Advocates & Defenders (GLAD), the ACLU, Lambda Legal, now Legal Defense and Education Fund, and Human Rights Watch. They seek from judicial supremacists what they cannot win from elected legislatures.

It is unfortunate that Massachusetts' public officials responded to the assault on marriage with words but not actions. Protesting that they oppose same-sex marriage, they knuckled under to the judicial supremacists and echoed the mantra that the court's decision is the law of the land. The failure of Massachusetts' elected officials promptly to use every legal weapon at their disposal to protect marriage encouraged judicial activists in other states, notably California, to indulge in similar same-sex mischief.

TAKING SIDES IN THE CULTURE WAR

The gay activists' campaign to bypass the legislative process and use judicial supremacists to achieve their goals has been going on for some years. In *Romer v. Evans* (1996), the Supreme Court overturned the decision of the majority of the people of Colorado who, by statewide referendum, had prohibited localities from granting a special protected status to homosexuals. Without any authority from the Constitution or citation of any applicable legal precedent, the Court ruled that Colorado's Amendment 2 was without a rational basis and was "born of animosity" toward homosexuals.

It would be more accurate to say that the Supreme Court's own decision was without a constitutional basis and was born of animosity toward traditional moral standards

and people who hold them sacred. Animosity is apparently a quality that judicial supremacists, but not voters, are permitted to have.

In *Romer*, Justice Anthony Kennedy's majority decision stated: "Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad." When Justice Kennedy said that Amendment 2 confounded judicial review, he meant that it confounded judicial supremacy. Amendment 2 would have limited the ability of the judges to invent new rights for homosexuals. When Kennedy said Amendment 2 was both "too narrow and too broad," he was spouting a contradiction to cover his failure to find any constitutional justification for invalidating Colorado's law.

In *Romer*, there was no case or controversy in the usual sense; there were some homosexuals and leftists who thought the amendment was bad policy, and the Court agreed. Amendment 2 was very simple and straightforward; the majority of Colorado voters understood its purpose and approved it. When Kennedy denied that Amendment 2 had "any identifiable legitimate purpose," he was taking sides in the culture war.

The same-sex-marriage activists know that the legal profession is predisposed to redefine marriage. The dissenting justices in *Lawrence v. Texas* (the 2003 Supreme Court decision that voided the Texas sodomy law) warned that the Supreme Court is imbued with the "law profession's anti-anti-homosexual culture." As Justice Scalia said in his dissent, *Lawrence v. Texas* "is the product of a law-profes-

sion culture, that has largely signed on to the so-called homosexual agenda,” and “the Court has taken sides in the culture war.” The *Goodridge* decision mandating same-sex marriage licenses was the predictable consequence of *Lawrence v. Texas*.

The out-of-the-mainstream attitudes expressed in the majority opinion in *Lawrence v. Texas* dealt a devastating blow to long-standing American laws and beliefs about morals and self-government, striking down our right to legislate against immoral actions, and doing so without advancing any argument that reasonably relates to the U.S. Constitution. No constitutional argument justified the decision that created the new right of sodomy. The decision evolved out of the social preferences of the justices and their pandering to liberal elites.

Justice Kennedy, who wrote the majority opinion, based it on “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives.” It’s obvious that using the criterion of “emerging awareness” gives much more latitude to the judicial supremacists who want to impose their avant-garde doctrines than does adhering to the Constitution, the text of the laws, and the intent of the people.

In *Lawrence v. Texas*, Justice Kennedy overturned a U.S. Supreme Court precedent of only seventeen years earlier (*Bowers v. Hardwick*, 1986). This is the same Justice Kennedy who upheld legalized abortion in *Planned Parenthood v. Casey* (1992) on the ground that the Court’s legitimacy depends on upholding the *Roe v. Wade* ruling of nineteen

years earlier. This is also the same Justice Kennedy who thumbed his nose at the votes of the majority of Coloradans in *Romer v. Evans* in 1996.

NOT A CIVIL RIGHTS ISSUE

Whining about discrimination, the gay lobby is trying to position the Massachusetts ruling as a logical expansion of the 1960s civil rights movement. It isn't. 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 sex, or already married to another. Sound reasons underlie all these requirements, which apply equally to everyone, male and female.

Same-sex marriage licenses are not needed to permit a small number of people to choose alternative lifestyles; they are already doing that. Gays already have the liberty to live their lives as they choose, create partnerships, set up housekeeping, share income and expenses, make contracts and wills, and transfer property.

What gays now demand is public approval and government support for a lifestyle that others believe is immoral (like adultery and bigamy). That amounts to the minority forcing the majority to license what it disapproves. It would force the rest of us to accept a public judgment that personal desire outweighs the value of traditional marriage and the need of children for a married mother and a father. It would give entitlements to gay couples in the areas of tax policy, education and classroom curricula, adoption, government

spending, the military, and Social Security benefits.

Advocates of same-sex marriage pretend that the applicant gays are the only relevant parties. That is plainly false since any license is an authorization by the state for the benefit of the public. Legislatures, not courts, should have the power to decide whether to issue a new type of license for marriage.

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 very close relative, or more than one wife? These practices are common in some countries.

If a thirteen-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.”

The equal protection and equal rights arguments of the homosexuals are totally phony and are clear admissions that the homosexuals intend to achieve their goals through the courts. America does not treat everyone equally, and the Constitution does not require it. The treatment of individuals under the federal income tax law is dramatically unequal. Many valid laws give benefits or protections to designated groups, such as widows (in the Social Security system), to children (in anti-pornography legislation), and to various people based on need. Many laws impose obligations unequally on designated groups (such as military draft registration and service). State governments grant

and deny licenses for dozens of activities, from fishing to gun ownership, using regulations that discriminate among different groups. They are certainly constitutionally justified in licensing traditional marriage but not licensing disfavored marital arrangements.

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.” 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 American people and our elected representatives absolutely have a rational basis for concluding that marriage between a man and a woman should be protected and encouraged. Marriage must not be changed to mean merely two consenting persons agreeing to share quarters and apply to the government and employers for economic benefits.

When the famous French commentator Alexis de Toqueville traveled the United States in the mid-nineteenth century, he recognized that respect for marriage is very American: “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.”

President George W. Bush, in his 2004 State of the Union Address, properly labeled “activist judges” as the

enemy of traditional values and urged us to use “the constitutional process” to remedy the problem. Bush called on Americans to defend marriage against activist judges who force “their arbitrary will” by court order “without regard for the will of the people and their elected representatives.”

THE BALLOT BOX VS. THE JUDGES

Citizens in many states responded to the challenge from supremacist judges by passing state constitutional amendments to define marriage as the union of one man and one woman. Nebraska passed such a state constitutional amendment in 2000, Nevada in 2002, thirteen other states did likewise in 2004, Kansas and Texas joined the list in 2005. Added to the Hawaii and Alaska amendments passed in 1998, that makes nineteen states that have passed constitutional amendments to protect traditional marriage. Several more states are expected to vote in 2006.

However, the judicial supremacists struck again in *Citizens for Equal Protection v. Bruning* (2005). U.S. District Judge Joseph Bataillon repudiated the 70 percent of Nebraskans who voted for this constitutional amendment. Here is its language: “Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership or other similar same-sex relationship shall not be valid or recognized in Nebraska.” Appointed by President Clinton, Judge Bataillon’s salient credential was his service as the Nebraska Democratic Party State Chairman from 1993-95.

His argument that the Nebraska law violates the First Amendment because it “chills or inhibits advocacy” of same-sex marriages is a legal embarrassment: gays can continue to advocate their agenda all they want. Bataillon’s argument that the Nebraska law unfairly prohibits people from “entering into numerous relationships or living arrangements” is also far-fetched. Under the Nebraska law, gays can have any relationships they want, but they do not have the right to force the government or the people of Nebraska to recognize those relationships or accord them special privileges.

Same-sex marriage advocates have launched an attack on the federal Defense of Marriage Act (DOMA), which was overwhelmingly passed by Congress in 1996: 342 to 67 in the House, 85 to 14 in the Senate. It was signed by President Clinton, and Senator John Kerry was one of the few who voted against it.

DOMA does two things. First, in everything that is touched by federal law or regulation, “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife,” and “spouse refers only to a person of the opposite sex who is a husband or a wife.” Second, Congress used its power under the “full faith and credit” provision of the Constitution to legislate that no state can be required to recognize another state’s adoption of same-sex marriage.

In compliance with the federal DOMA, thirty-nine states have enacted their own state DOMAs, and nineteen states put defense of marriage in their state constitutions. Even

liberal California passed a voter initiative (Proposition 22) in 2000 to protect marriage with 61 percent of the vote.

But the gay-rights lobby is determined to knock out DOMA. It survived the first two lawsuits against it, one in Florida and one in California, but lawyers and commentators predict that it's only a matter of time before a judge declares it unconstitutional.

Will Congress just grumble but do nothing to stop out-of-control judges from replacing self-government with their imperial edicts? If Congress fails to restrain judges from violating DOMA, we can expect anti-marriage atrocities to continue as an unelected judiciary remakes America into a society that undermines traditional marriage.

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- The rejected federal Equal Rights Amendment (ERA) read: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” During the ten-year battle for ratification, 1972-1982, some ERA advocates denied that ERA would require the granting of marriage licenses to same-sex couples, but most legal scholars admitted this because the plain meaning of the amendment prohibits

all discrimination “on account of sex.” Senator Sam Ervin Jr., the leading constitutional lawyer in the U.S. Senate until his retirement, stated in Raleigh, NC (Feb. 22, 1977): “I don’t know but one group of people in the United States the ERA would do any good for. That’s homosexuals.” Senator Ervin told the U.S. Senate that ERA’s requirement to recognize same-sex marriages illustrates “the radical departures from our present system that the ERA will bring about in our society.” He placed in the *Congressional Record* (Mar. 22, 1972) similar testimony by legal authorities Professor Paul Freund of the Harvard Law School and Professor James White of the Michigan Law School. This analysis was also supported in Perkins and Silverstein, “The Legality of Homosexual Marriage,” 82 *Yale Law Journal* 573, 583-589 (Jan. 1973), and in the leading textbook on sex discrimination used in U.S. law schools, *Sex Discrimination and the Law* by Barbara A. Babcock, Ann Freedman, Eleanor Holmes Norton and Susan Ross (Little Brown, 1975).

- UCLA Professor Eugene Volokh’s quote is at <http://volokh.com/>
- The text of Colorado’s Amendment 2:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

- The states where the voters passed state constitutional amendments to protect marriage as a relationship of a man and a woman are: Hawaii 1998, Alaska 1998, Nebraska 2000, Nevada 2002, Missouri 2004, Louisiana 2004, Arkansas 2004, Geor-

gia 2004, Kentucky 2004, Michigan 2004, Mississippi 2004, Montana 2004, North Dakota 2004, Ohio 2004, Oklahoma 2004, Oregon 2004, Utah 2004, Kansas 2005, Texas 2005. These nineteen state constitutional amendments passed by an average of more than 70 percent, ranging from 57 percent in Oregon (where the same-sex marriage advocates carried on their most aggressive campaign) to 86 percent in Mississippi. The eleven amendments that were on the ballot in November 2004 all (except Utah) passed with a majority that was significantly larger than the vote for President Bush, which indicates that the power of this issue runs far deeper than party affiliation.

LESSON THREE

JUDGES REDEFINE MARRIAGE

QUESTIONS FOR DISCUSSION:

- ★ Was Justice Antonin Scalia correct when he said the judges have taken sides in the culture war?
- ★ Discuss the absurdity of Massachusetts judges ruling that John Adams' 1780 State Constitution authorizes same-sex marriage.
- ★ How did the Supreme Court decisions in *Romer v. Evans* and *Lawrence v. Texas* pave the way for judicial approval of same-sex marriage?
- ★ Which states have ordered same-sex marriage licenses, and what part did state Equal Rights Amendments (ERA) play in those decisions?
- ★ Explain the importance and text of the federal Defense of Marriage Act (DOMA) and the 20 state constitutional marriage amendments.
- ★ Is same-sex marriage a judicial or a legislative issue?
- ★ How can we stop judicial supremacy about marriage?