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## GOODRICH VS. DEPT. OF PUBLIC HEALTH

by Dr. Paul Jehle

On November 18, 2003, the Supreme Judicial Court of Massachusetts issued its decision entitled *Goodrich vs. Department of Public Health*. Liberals hailed it as a step forward in civil rights and the gay community began to plan Spring weddings. Conservatives blasted the decision as harmful to the institution of marriage. But *what ought believers to do in light of this decision?* What should the response of the General Court be that has taken an oath to "*support the constitution... so help me God?*"

### The Goodrich Opinion

*"Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society.... The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.... the arguments made... failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples."*

Thus begins Chief Justice Marshall's opening paragraph in the *Goodrich* opinion. The three concurring justices, making this a 4-3 decision, were Justice John Greaney, Justice Roderick Ireland and Justice Judith Cowan. In analyzing this first paragraph, we note several points.

First, we might all agree that marriage is a "vital social institution." Second, it is also an "exclusive commitment" of two individuals (thus ruling out polygamy). But third, the key question is *not* whether the constitution of the Commonwealth of Massachusetts restricts (or denies) benefits to same-sex couples. Though the constitution affirms the dignity and equality of all individuals and forbids the creation of second-class citizens, by its very nature the constitution does *not* grant *civil* rights, it instead *protects unalienable* ones. Such a constitution does not grant or deny benefits.

### The Doctrine of Unalienable Rights

*"All men are born free and equal, and have certain natural, essential, and unalienable rights"*

### Part the First, Declaration of Rights, Article I

*"The end of the institution, maintenance and administration of government, is to secure... to protect... and to furnish the individuals who compose it, with the power of enjoying in safety and tranquility their natural rights"*

### Preamble to the Massachusetts Constitution

The word "unalienable" is defined as *"that which cannot be transferred"* and the word "right" is defined as *"conformity to the will of God, or to his law, the perfect standard of truth and justice."* In other words, unalienable rights are those given by God and cannot be taken away by government. This concurs with the Declaration of Independence, written four years prior to our 1780 constitution in Massachusetts:

*"We hold these truths to be self-evident, that all men are Created equal, and are endowed by their Creator with certain unalienable rights." - Declaration of Independence*

The entire premise of both the Declaration and the Massachusetts State Constitution is that our rights are given by God, *not* by government. This makes our rights unalienable, and by definition are *not* creations of the civil government (or civil rights). A civil right is alienable, being the very opposite of those rights protected by our constitution.

Does our State constitution acknowledge the God who alone grants rights? Consider the following:

*"We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the Great Legislator of the Universe..." - Preamble*

As citizens of Massachusetts, our very covenant that created our Commonwealth acknowledges God as the great Legislator (lawgiver). If laws originate from Him and define the very essence of our morality and justice, then certainly our rights come from Him as well.

*"It is the right as well as the Duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and preserver of the Universe."*

### Part the First, Declaration of Rights, Article II

Acknowledging the God of the Bible is not a private religious act as most suppose. The kind of God one acknowledges is critical in relation to the source of our laws and rights. Either there is a God above the civil government that delegates to it jurisdictional duties through the consent of the people, or government itself assumes the prerogative of total sovereignty, able to define and redefine the "god" that bestows rights. When this occurs, constitutions no longer define the express powers of government but instead merely limit the all-powerful state that has assumed godlike and centralized proportions of

executive, legislative or judicial powers.

The real question before us is *not* whether the constitution of Massachusetts forbids same-sex marriage, but rather whether the *source* of our rights is God or government? If it is God, then which God? For the kind of God we acknowledge will determine the kind of rights we possess. If it is government that grants rights, then the entire premise of our state constitution is changed, and none of our rights are stable or protected, regardless of one's views on gay marriage.

### **Our Constitution: An Express Powers Document**

*"All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."*

#### **Part the First, Declaration of Rights, Article V**

The Massachusetts constitution of 1780 is defined as an express powers document. All power comes from God to the people, and they by their consent, to government. Thus, the constitution *defines* the only power government has, it does *not* limit governmental power. It is the people who have all the power directly from God, *not* the government, and thus the people define the only power government has.

If something is not stated in the State constitution, the Commonwealth has no power to define or regulate it because it is presumed to be either a natural right given by God or the jurisdiction of more local self-governing entities. We can at times discern unalienable rights by what is *not* written in the Constitution. If the goal is to derive new civil rights from the government that will bring a greater "equality" to the citizen, we are mistaken and will suffer the consequences history has taught us; a loss of rights for everyone.

In Article IV of Part the First, the same principle in relation to the federal constitution is stated. Every power not expressly delegated to the national government is reserved to this State and its people. The federal constitution itself declares this same principle in Amendments 9 and 10 of the Bill of Rights. This question of *jurisdiction* is so important that it is here that the real battle will be won or lost. If we lose unalienable rights, we have surrendered our liberties.

### **Marriage and Massachusetts**

*"Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law."* - Chief Justice Marshall, Goodrich v. Dept. Of Public Health

Marriage is *not* explicitly defined in the constitution of the Commonwealth. Some wonder why. Why define something that by premise and assumption is already defined in common law and not under the power of government to alter? The nature of constitutional law is to define due process, but not to define all the rights it protects. The *common law* is the base of our constitution, as it is in all fifty states. This the law given by our Creator, with certain natural, unalienable rights.

Thus, when Chief Justice Marshall states above that same sex couples are *arbitrarily* barred from the civil benefits of marriage, she is not stating the whole truth. Marriage is not a civil benefit, it is a fundamental right of voluntary association under common law. The word equality is given new meaning when the constitution, instead of protecting unalienable rights now must not exclude minorities from benefits given to others. The result is that the Constitution is viewed as a special welfare document, granting privileges and external equality to *groups* rather than protecting *individual* unalienable rights equally given by God.

When the plaintiffs argued that the Constitution did not specifically bar gay marriage and thus it ought to be considered constitutional, Chief Justice Marshall accurately stated "*we interpret statutes to carry out the Legislature's intent, determined by the words of a statute interpreted according to 'the ordinary and approved usage of the language.'*" She notes that Black's Law Dictionary defines marriage from a common law base as "*the legal union of a man and a woman as husband and wife.*"

The next question is *how* Massachusetts protects, by due process, this right of marriage. Marshall states in her ruling that "*government creates civil marriage.*" If a new definition of marriage is to be derived by the State, making it a civil right instead of an unalienable right of liberty, we have two opposing ideologies at work which by nature cannot coexist within a culture.

The *General Laws of the Commonwealth* that apply our constitution do not define marriage either. Instead, they govern its practice by restricting polygamy and the marriage of close relatives. Again, the reason no definition is given is because it is assumed. The premise upon which definitions of marriage as well as other social institutions such as the family are excluded in the statute code is to protect it from government definitions and intrusive regulation.

### **The Dangers of a Marriage Amendment**

*"It being the public policy of this Commonwealth to protect the unique relationship of marriage in order to promote, among other goals, the stability and welfare of society and the best interest of children, only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts. Any other relationship shall not be recognized as a marriage or its legal equivalent."* - House Bill 3190, proposed Amendment to the Massachusetts State Constitution

Though the text of this proposed amendment can be agreed to by many conservatives, it is not the text that is the problem, it is the nature of positive law that endangers our liberty. If the Constitution of Massachusetts accepts an amendment in order to "clarify" the intent of the common law, how many other areas will need clarifying in the future? Must the government be the defining agent? If so, how could our rights remain unalienable?

A Marriage amendment will not solve the problem, but might instead encourage the very problem we wish to solve! The problem is not a lack of definition for marriage in the civil code, or a fight between gay activists and conservatives for who will get the political privilege of a government granted civil right. The root problem is whether or not we are going to remain a State that accepts its natural rights as those given by God, (or unalienable), or return to the dark ages when rights were granted by governments in place of God.

If the so-called Marriage Amendment passes, then marriage could become codified as a civil government-granted right. It has already been deemed so by Marshall as well as the other Judicial opinions both concurring and dissenting. It can then change as new leaders are elected. The focus then becomes a battle over the gay agenda, and who has the most votes. It will gender accusations and slander from one side against the other, forcing the Christian community into a defensive posture and making it more difficult to demonstrate love.

Our own lack of heterosexual marriage integrity now comes back to bite us. To argue as the plaintiffs did that marriage ought to remain as a civil right due to procreation, child rearing and the financial benefits and resources of the State is to argue on faulty, sandy grounds. The marriage covenant is deeper than the first two, and ought never be entered into for the latter. Rampant divorce and irresponsible child rearing has removed much of the platform for pragmatic arguments from the evangelical community.

The real question at hand is whether we will surrender the nature of our system of rights in a republican form of government. A socialistic democracy has a government that equalizes benefits, redistributing wealth as the active majority sees fit. A republic is a government of natural law (under God) to which both the leaders and governed must submit. It thus affords greater protection for everyone. If we do not understand the real principle, we face the potential descent to democracy, and all of us will have lost our unalienable rights.

### **Judicial Usurpation**

*"to label the court's role as usurping that of the Legislature... is to misunderstand the nature and purpose of judicial review...." - Marshall, in Goodrich*

*"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, pursuant to Article 30." - J. Spina,*

## dissenting opinion in Goodrich

Judicial review is today best defined as judicial tyranny. The founders of our federal constitution, and prior to that, the state of Massachusetts, adhered to a very limited role for the judiciary. If judicial review is having the final say regarding the constitutionality of any issue, it in fact is writing law and usurping the role of the legislature. To give the General Court 180 days to *do anything* is a form of tyranny.

Legislative engineering is not the answer either. The General Court is not charged in the constitution with initiating social change within a culture. This rests all premises of fundamental natural law and rights with the government rather than with God. To curb a runaway judiciary but leave unchecked the loss of unalienable rights is only rearranging symptoms instead of solving the problem.

The dissenting opinions on the court agree that a violation of Article 30 has occurred in the rendering of this decision:

*"In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial power, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them, to the end it may be a government of laws and not of men." -*  
Article 30, Declaration of Rights

Could anything be clearer? The judicial branch shall never exercise the legislative powers in order to preserve a government of law and not of men. This right has been violated, regardless of what one thinks of gay marriage.

*"The General Court shall forever have full power and authority to erect and constitute judicatories and courts..."*

## Part the Second, Chapter 1, Section 1, Article III

It is the Legislative branch that created the judicial courts. The creature, though separate and distinct, and having its own jurisdiction, cannot arise and consume its creator. It is a fundamental concept in law that the final check is with the superior, in this case the Legislature.

*"Each branch of the Legislature, as well as the Governor and Council, shall have authority to require the opinions of the Justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."*

## Part the Second, Chapter III, Article II

Note that a court's ruling is an "opinion" and not law. Asking or receiving an opinion does not constitute enacting law. The opinions of the Supreme Judicial Court apply to the case they are adjudicating, and do not bind the Legislature.

*"full power and authority are hereby given and granted to the said General Court... to make, ordain, and establish, all manner of wholesome and reasonable... laws, statutes.."*

Part the Second, Chapter I, Section 1, Article IV

The legislature has the *full power* to ordain, establish and constitute laws and statutes. No other branch is given this power! Thus, the Supreme Judicial Court has overstepped its bounds and violated its oath of office by ruling in areas forbidden by the constitution of Massachusetts.

*"All causes of marriage, divorce, and alimony, and all appeals from the Judges of probate shall be heard and determined by the Governor and Council, until the Legislature shall, by law, make other provision."*

Part the Second, Chapter III, Article V

If in matters of law the Legislature is supreme over the initial hearings of the judicial branch, then it follows that the General Court has a check upon a runaway judicial branch!

**The Constitutional Oath of Office**

*"I do solemnly swear that I will bear true faith and allegiance to the Commonwealth of Massachusetts, and will support the constitution thereof. So help me God." - Article VI,*

Amendments to the Massachusetts Constitution

There is a reason legislators place their hand upon a Bible and raise their right hand when taking their oath of office. The oath is not to public opinion or equalizing the benefits of every group. The oath of office is to the *constitution* of the Commonwealth. Invoking the name of God as a party to that covenant is a part of the definition of an oath.

**Oath** - *"a solemn affirmation or declaration, made with an appeal to God for the truth of what is affirmed. The appeal to God in an oath, implies that the person imprecates his vengeance and renounces his favor if the declaration is false, or if the declaration is a promise, the person invokes the vengeance of God if he should fail to fulfill it. A false oath is called perjury."* - Webster's 1828 Dictionary

The Judiciary of Massachusetts has violated their oath of office. They have not violated their oath in regard to their view of the homosexual community, gay rights or gay marriage. They did not take an oath regarding beliefs of this kind. They took an oath to be true to the constitution of the Commonwealth. Regardless of their views on gay marriage, they have usurped the role of the Legislature, which is a clear violation of their oath. The Legislature could call for their impeachment (Chp. 1, Sec. 2, Art. VIII; Sec. 3, Art. VI).

The Legislature, if they remain passive and do nothing, allowing this so-called "ruling" to go into effect, may also violate their oath. The Legislature cannot delegate lawmaking to another branch. They need not enact a single law or pass an amendment. They simply need to clarify that it is not the role of the judiciary to establish new definitions to common law. For if it is, then our civil rights are within the minds of four judges who have assumed the role of God.

### Conclusion

I return to the initial questions at the beginning of this paper. *What ought Christians and concerned citizens to do in light of this decision? What ought the response of the General Court to be in relation to their oath to "support the constitution... so help me God?"*

1. Believers ought to heed Matthew 7:1-5. The finger of God's judgment is not primarily on the SJC, the gay community, or the Legislature, it is on the church that has little testimony of demonstrating integrity and love. We ought to repent of our own ignorance of our State constitution as well as our lack of pointing the finger at our own sin.

2. The believer, citizen and General Court ought then to *acknowledge God* as the origin of our rights as affirmed in the Constitution of the Commonwealth. **Prayer**, focused on repentance for violating our own conscience and oath ought to be the direction of our prayers, not accusations of others.

3. Citizens and those who call themselves Christians ought to *reach out* to the gay community and demonstrate love for them, attempting to let them know that this decision does them no favors. We need to mourn the loss of unalienable rights for *all citizens*, regardless of what they believe. Granting the gay community a judicial civil right keeps them, as well as the rest of us, dependent upon the State.

*The real question for discussion is whether or not the God acknowledged in the constitution offers the kind of rights that protect liberty for all - including those who disagree with the God of the Bible.*

*This decision, in my opinion, restricts the freedom of those who call themselves gay, and brings every aspect of their lifestyle into the courts for litigation and scrutiny. We need to help everyone see that a government granted privilege is no real security.*

4. We must, as citizens, humbly share our opinions with our representatives over the next two to three months. Study, ponder and articulate your views clearly. If the citizens of Massachusetts say and do nothing during this time, it will only support apathy and passivity in the Legislature. Let us stand up for equal justice by curbing a runaway judiciary and encourage the General Court to put the constitutional checks upon them that are warranted by their oath of office.

5. The General Court ought to issue a clarification of the Goodrich opinion. It



ought to relate first that it is only an opinion, and not law. It ought to clarify that the common law, and natural rights, long established in the Commonwealth, are the best security for the protecting of everyone's rights, including the gay community. It has been the practice of a special welfare state that has encouraged all of us to go to government to gain financial benefits when we ought to look to God or the gifts he has given each of us to be productive. Granting minorities privileges only makes the foundation for all of our rights that much more unstable.

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