

JOHN LEO

Judicial end-run

Some admire the homosexual-marriage ruling in Massachusetts. Some don't. But surely the heart of the story is the stupefying arrogance of the state's Supreme Judicial Court.

If you are going to stretch a state's constitution beyond all previous understanding and impose what many people believe is a fundamental redefinition of marriage, you don't do it in a 4-3 vote.

There is no consensus among Massachusetts voters for such dramatic change. On a liberal court, thought to be favorable to homosexual issues, there was not even a consensus among the seven judges who pondered the issue for more than a year. The three dissenters expressed some sympathy for gay arguments but also some serious legal doubts. Justice Martha Sosman wrote that, as a matter of constitutional jurisprudence, "the case stands as an aberration. To reach the result it does, the court has tortured the rational basis test beyond recognition." No matter. Chief Justice Margaret Marshall rammed the ruling through anyway.

In the manner of modern judicial elites, the four judges rode roughshod over the legislature and the voters. They shut down the compromise option of allowing gay civil unions. They con-

structed the ruling so the legislature could address the issue in only one way — by ratifying what the court demanded. "Do it our way, or we'll do it ourselves," was the clear message. No, the judges wouldn't want to leave open the possibility democracy might break out in the legislature.

The court also seemed to close the door on being overruled by a constitutional amendment. It ordered the legislature to act in accordance with its wishes in 180 days, and by law the constitution can't be amended in less than three years. By then thousands of gays will have married.

The four went further than any other state court has gone. Courts in Hawaii and Alaska approved gay marriages but made no attempt to hamstring legislators. In both states, legislatures passed constitutional amendments limiting marriage to heterosexual couples.

How could the four have missed the obvious lesson of *Roe vs. Wade*? The U.S. Supreme Court's abortion decision, imposed out of the blue with flimsy constitutional cover, shortcircuited debate in its early stages. It took the issue out of democratic politics and sparked 30 years of social turmoil. It gave everything to one side of the debate, nothing to the other, and made a Euro-

pean-style compromise impossible by its arrogant and constitutionally dubious "fundamental right" ruling. It assured rage by making its decision democracy-proof: As anti-abortion forces quickly learned, the ruling could not really be modified by democratic decisionmaking.

Well, here we go again. Although there has not yet been a serious debate on same-sex marriage, the shortcircuiting process is already far advanced, complete with attempts to bar the civil-union compromise and to make a constitutional amendment almost impossible. Once again, no consensus and no broad debate. And just as with the abortion decision, a court is summoning up enormous opposition by foreclosing normal democratic procedures.

Why do judges behave this way? One reason is "landmarkism." The loudest applause from the legal academy tends to come after a far-reaching allegedly progressive decision unsupported by public opinion, and with no real basis in the U.S. Constitution or case law. No judge gets to be admired by the legal and media elites by simply following law and precedents. No glamour there. You have to make something up.

Brown vs. Board of Education in 1954 was a good and necessary decision, but it created the monster of "landmarkism." It also deeply affected left-right politics. As the left gradually despaired of attracting a majority of voters to its programs, it opted

for a strategy of going around the voters by relying on judges to impose liberal outcomes. This liberal end-run around politics is what the current battle over judges is all about.

Then, too, the mind-set of media and judicial elites is dominated by a very simplistic view of the homosexual marriage issue — that it pits bigotry against valiant attempts to include an oppressed group.

That pared-down view of the issue is the reason serious concerns are not on the elite radar screens. The Massachusetts decision depicted marriage as an intimacy choice for individuals. Procreation and child-rearing, central to a prevailing view of marriage for most of Western history, pretty much disappeared in the decision. Chief Justice Marshall even played this point for laughs in oral arguments, asking whether a married couple should be forced to divorce if they are childless after 10 years. Chuckles ensued.

This attitude almost guarantees that homosexual marriage, unlike civil unions or benefits for committed gays, will now produce an enormous and divisive national uproar. Right in the middle of a presidential campaign. Good work, Massachusetts.

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