

By Richard A. Hogarty
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NOT EVERYONE is pleased with the recent decision by the Supreme Judicial Court legalizing gay marriage. Governor Mitt Romney immediately denounced the court's decision and made it clear he would seek to amend the state Constitution to define marriage as being between a man and a woman. At the same time, however, he left himself some wiggle room by saying that he would support a civil unions law designed to grant gays most of the legal benefits enjoyed by heterosexual couples.

Public reactions to the decision were predictable. The Massachusetts Gay and Lesbian Political Caucus, of course, reacted favorably to the majority opinion. Gay rights groups supported the ruling, while Catholic bishops spoke mournfully of "chaos" and "national tragedy." Other organizations, such as the Massachusetts Family Institute, questioned whether gay marriage is necessary, useful, or desirable for the good of society. They see it as destroying the institution of marriage as we have known it for centuries.

Romney initially emerged unbruised from the controversy. The gay activists, who wished to keep him "liberal" on other issues, indicated that they understood how his Mormonism influenced his position. Then President George W. Bush weighed in on the dispute by saying that the SJC "overreached its bounds as a court." He went on to say, "It did the job of the Legislature. It was a very activist court in making the decision it made. As you know, I'm a person who believes in judicial restraint."

The political ramifications of the SJC's work did not escape their notice. Closer, more detached examination indicates that the Republican Party appears ready to exploit the potential backlash. Columnist David Shribman put it best when he observed, "The flight of white evangelical Protestants and religious Catholics from the Democrats to the Republicans is one of the signal political events of our time. This issue [gay marriage] is the fire next time -- and religion is the key to understanding its implications in American politics."

Somewhat curiously, the judges stayed their decision for 180 days in order to give the legislature a chance to respond. Presumably, the legislators can exercise the option of passing a civil unions law without legalizing gay marriage. Legal experts disagree as to whether the SJC allowed for such discretion. Attorney General Thomas Reilly believes that it did. However, Harvard legal scholar Laurence Tribe believes that the court's decision was "unambiguous" in declaring that any ban on same sex marriages violated the equal protection provisions of the state constitution. He views it as a done deal. Given the amount of confusion about the court's decision, Senate President Robert Travaglini recently asked the SJC for an advisory opinion on the constitutionality of a civil unions

bill. In considering the Senate's request, the SJC is now soliciting legal briefs from "interested persons."

A lifetime of studying government and politics convinces me that the law is a systematic striving to regulate human behavior. Part of my difficulty arises from the clear teaching of my church that homosexuality is morally wrong. The issues before the SJC, of course, are constitutional, not moral, but it sometimes takes superhuman effort to separate the two. I have tried and am continuing to try to mark that separation.

In my view, judges draw their peculiar strength from their aloofness from the partisan issues that divide society. Their function is to unify, not to fracture, to set limits and define boundaries within which the political processes can operate, not to ordain specific solutions to vexatious, divisive, and perhaps insoluble problems of public policy.

Here they should stay above the fray by leaving specific solutions to this problem where they properly belong: to the elected representatives of the people. If those representatives stray beyond the bounds of reasonable constitutional interpretation, then, but only then, should the judges hurl their constitutional thunderbolts. "Courts," as former US Supreme Court Justice Harlan Stone reminded us, "are not the only agency of government that must be assumed to have capacity to govern."

Because the Legislature reflects many interests and because it is a practical political institution, I value its function of resolving such clashes. Not even the strongest partisan of the Legislature would claim that it does all these things well, but no one has yet provided any substitute for the representative legislative body as a forum for law making.

Neither the executive, the courts, nor the bureaucracy have the unique qualifications for broad rule-making that the Legislature does. The ball on civil unions is literally in their court.

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