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One Man and One Woman

By Robert P. George

Last week, in its ruling in *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts by a vote of 4-3 struck down that state's marriage law as "failing to meet the rational basis test for either due process or equal protection." The court gave the Legislature 180 days to revise the law in line with the judges' redefinition of marriage as "the voluntary union of two persons as spouses, to the exclusion of all others." If the Legislature fails within that time frame to direct Massachusetts public officials to issue marriage licenses to same-sex couples, the court will do it for them.

The ruling has major flaws. First, the judges invented a right of "same-sex marriage" found nowhere in the text, logic or historical understanding of the state constitution. In so doing, they usurped the authority of the people's elected representatives. Second, they ignored the philosophical and social reasons that have, for millennia, provided the "rational basis" for understanding marriage as the covenantal commitment of a man and a woman. Chief among these are the nature of marriage as a "one-flesh union" of sexually complementary spouses, and its value in ensuring that most children are reared with a biological mother and father bound to each other in a covenant shaped by moral obligations of fidelity and exclusivity.

Third, having radically redefined marriage to remove the requirement of sexual complementarity that links marriage as an institution to procreation and helps to provide its intelligible moral structure, the judges failed to provide any "rational basis" for their declaration that marriage should be closed ("to the exclusion of all others"), even if spouses happen to prefer an "open" marriage; nor did they offer any reason for treating marriage as intrinsically limited to two persons. These are the Achilles' heel of the movement for "same-sex marriage." No advocate has been able to identify a principled moral basis for the requirements of fidelity and exclusivity in marriage as they wish to redefine the institution.

What next? Following the lead of Hawaii and Alaska, whose courts tried to impose "same-sex marriage" on those states a few years ago, the citizens of Massachusetts could amend their constitution to define marriage as union of man and woman. The trouble is that in a state so liberal, an amendment to overturn *Goodridge* may not be politically feasible. In any event, it will be a long, hard slog; and an amendment could not go into effect until 2006, by when there will be hundreds of Massachusetts "same-sex marriages." And in the meantime, the movement to redefine marriage will initiate litigation throughout the country seeking recognition of Massachusetts "same-sex marriages."

The U.S. Constitution requires states to give "full faith and credit" to the "public acts, records, and judicial proceedings of every other state." Activists will invoke this principle to demand that West Virginia, for example, recognize Massachusetts marriages—even those that could not lawfully have been contracted in West Virginia. In this way, they will try to use a one-vote victory in Massachusetts to redefine marriage for the entire nation. In the end, the matter will go to the Supreme Court. That's good news for the redefiners. In *Lawrence v. Texas*, the justices struck down a state law prohibiting homosexual sodomy in a ruling so broad as to, in the words of dissenting Justice Antonin Scalia, "dismantle the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."

Having in mind the combination of the Massachusetts court's decision in *Goodridge* and the Supreme Court's ruling in *Lawrence*, President Bush has vowed to do "whatever is legally necessary to defend the sanctity of marriage" as the union of one man and one woman. What *is* necessary? Anyone who is alert to the signals being sent by the Supreme Court knows that a federal legislative approach, such as a beefed up Defense of Marriage Act, is doomed. A majority of justices have made clear that they share the view, common in elite circles, that traditional standards of sexual morality are outmoded, and distinctions of any kind between heterosexual and homosexual conduct are rooted in animus and amount to bigotry. They will strike down any legislative act by which Congress seeks to preserve the traditional understanding of marriage or uphold the authority of states to do so. That leaves but one option: amending the Constitution. The process is daunting, and it requires votes of two-thirds of both houses of Congress followed by ratification by three-quarters (i.e., 38) of the states. Is there any hope that an amendment could succeed?

Yes. The best evidence is that no serious Democratic presidential contender is willing to support "same-sex marriage." Messrs. Kerry, Lieberman, Gephardt, Clark, Edwards—even Dean—say they favor "civil unions," but oppose redefining marriage to include same-sex partners. They know that most Americans understand marriage as the union of a man and a woman and want this understanding preserved in their law. To do "whatever is necessary" to preserve it, President Bush will have to lead the fight for a federal marriage amendment. Supporters agree that it should define marriage as the union of a man and a woman. There are differences of opinion, however, on whether an amendment should forbid states from enacting civil unions or domestic partnerships. To forbid such arrangements, some contend, would be to trample on principles of federalism. To fail to forbid them, others reply, would be to protect marriage in name, but not in substance. An amendment that did not prohibit civil unions or domestic partnerships would be merely symbolic.

It is important to protect the substance of marriage, but a sound amendment need not, however, forbid states from enacting certain forms of domestic partnership. It need only ensure that laws do not treat nonmarital sexual relationships as if they were marital by making such relationships the basis for allocating benefits. An amendment protecting the substance of marriage would ensure that neither the federal government nor the states may predicate benefits, privileges, rights or immunities on the existence, recognition or presumption of nonmarital sexual relationships. In other words, domestic partnerships, if states elect to have them, should be nondiscriminatory and inclusive. They should be available to people based on needs, not on sex. The law certainly should not discriminate in favor of those unmarried people who are in sexual relationships over those with the same needs who, though committed to caring for each other, are not sexual partners. Widowed sisters living together and looking after each other, or an unmarried adult son taking care of his elderly father, may have the need for domestic partner benefits such as hospital visitation privileges and insurance rights.

A constitutionally sound domestic partnership law would not discriminate against such people by excluding them from eligibility simply because their relationships are not sexual—just as a nondiscriminatory and inclusive law would not undermine marriage by treating unmarried sexual partners as if they were married.

Mr. George is professor of jurisprudence at Princeton.