Same-Sex Marriage: The Difficult Road Ahead

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By Vincent J. Samar*

“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.” With those words, the Massachusetts Supreme Court in Goodrich v. Department of Public Health, 440 Mass. 309, 798 N.E. 2d 941 (2003, went down in history as the first state supreme court to find that its state’s ban on same-sex marriage violated its state’s constitutional requirement to afford due process. It was also the third such court to find that such bans deny fair and equal treatment to all their citizens.

Previously, the Supreme Courts of Hawaii in Baehr v. Lewin, 74 Haw. 530, 852 P. 2d 44 (Haw. 1993) (since reversed by state constitutional amendment) and Vermont, in Baker v. Vermont, 170 Vt. 194, 744 A. 2d 864 (Vt. 1999), under the Vermont Common Benefits clause, had held that such bans fail to afford equal legal benefits to those who seek to live in committed same-sex relationships compared to their opposite-sex counterparts. The Vermont decision has since been codified into that state’s law with a new statute conferring all the legal benefits and responsibilities of marriage under the legal imprimatur of “civil unions.” Similar to the Vermont decision, the Massachusetts Supreme Court stayed for 180 days the likely effect of its holding, in order to provide the state legislature a chance to take appropriate action before the lower (trial) court orders the issuance of marriage licenses. The Massachusetts decision is in several important ways different, however, from the Vermont ruling.

First, while the Massachusetts decision recites a very long list of legal benefits and responsibilities associated with marriage (especially but not exclusively as these relate to children), the Court was also very clear in recognizing the intangible benefits of marriage: “Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.” 440 Mass. At 322, 798 N.E. 2d at 954). Such language may signal what a future court response will be if the state’s legislature tries to respond to this court’s ruling by adopting a Vermont styled civil union approach. For in both its tone and content the language of

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the decision suggests that what is needed is marriage; nothing else should suffice. In the court’s words, “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. For those who choose to marry and for their children, marriage provides an abundance of legal, financial, and social benefits. It also imposes weighty legal, financial and social obligations.” 440 Mass. At 312, 798 N.E. 2d at 948. Implicit in the court’s language is also the very personal way in which marriage can exhibit for the couples involved deep commitments to each other’s aspirations and their individual capacities to bring those aspirations to fulfillment.

Second, this was the first state supreme court to find, under its state constitution, that bans against same-sex marriage violate both its due process and equal protection clauses. “Barred access to the protections, benefits and civil obligations of 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.” 440 Mass. At 313, 798 N.E. 2d at 949. The earlier decisions had all followed more strictly a state equal protection (or close cousin to equal protection in the case of Vermont’s equal benefits) type approach.

Third, the fact that the court engaged a rational basis review of the statute makes its holding that such bans violate the state’s constitution all the stronger. Normally, rational basis review is a far easier standard for a statute to meet in order to be found constitutional, since it only requires an impartial lawmaker to logically believe that the classification serves a legitimate governmental purpose, which justifies it in the face of the harm done to the disadvantaged group. A court in performing a rational basis review would normally be satisfied if the statute were a reasonable exercise of the state’s police power to achieve a legitimate interest. There would be no need for any higher degree of scrutiny of the governmental purpose as would be the case if the court went further to find that lesbians and gay men, as a group, have endured a long history of social discrimination, which embodies a gross unfairness, for which they are politically powerless to change. That higher standard is usually the one that makes the government’s job in getting its statute to pass constitutional muster almost impossible. Nevertheless, the court, even though relying on the lower standard, was unable to agree with the government’s rationale for
restricting marriage to only opposite-sex couples. That rationale was to promote procreation, provide a more optimal setting for child rearing, and preserve scarce state and private financial resources. The court found that none of these arguments justified the government’s restriction. Under Massachusetts’s law, marriage was not limited to only those who procreate or promise to procreate. Moreover, same-sex couples were already raising children well, and Massachusetts’s law prohibited discrimination in child custody cases based on sexual orientation. Finally, state and private aid to families is usually based on need and not on whether a couple co-mingles its funds.

What the court did find was that civil marriage is a creation of the state through its police power and that in matters implicating marriage, family and the upbringing of children, due process and equal protection overlap. In this regard, because opposite-sex marriage was already recognized as a fundamental right by both the state and federal constitutions, unless there was an important reason for separating the liberty interest of gays and lesbians from those of other people, a position already renounced by the U.S. Supreme Court’s recent decision in Lawrence v. Texas, 539 U.S. 558 (2003) (holding unconstitutional state laws prohibiting adult consensual homosexual sodomy), there was no basis to treat the interest of same-sex couples any differently when it came to marriage from the interests of opposite-sex couples.

What happens next? I would like to suggest a hypothetical scenario for what the future might look like assuming that the Massachusetts’ decision is not overturned by adoption of a state constitutional amendment. The scenario I have in mind begins with a couple, James and Howard, who currently reside and work in Boston and have lived there together for let’s say 15 years. Recently, Howard was offered a new job with the city of Chicago, which he plans to take, in part, because the city grants domestic partnership benefits. James is employed in a private sector job, which will allow him to relocate to their Chicago loop office; however, this job provides no spousal benefits for the domestic partners of same-sex couples. Jim and Howard also have custody of their two children, one by a surrogate mother arrangement with Howard as the natural father and the other as the natural child of James, which Howard was allowed to second-parent adopt after James’ ex-wife abandoned the child. After the Supreme Court of Massachusetts rendered its decision the state legislature amended its “Marriage Act” to allow same-sex marriage. Having always wanted to marry because of the social recognition and the benefits that accompanies marriage, prior to their leaving Boston, James and Howard got married before a justice of the peace with the marriage
being properly recorded in the county records where it took place. On arriving in Chicago, however, the couple finds that the city would no longer provide health care benefits for its same-sex coupled employees. Apparently, a right wing group had challenged the local ordinance that allowed the city to use taxpayer money to fund the benefits on the ground that this was a violation of the Home Rule Law. Under that law, the City can operate as a government, but it cannot do more for its employees than the state of Illinois can do, and the State of Illinois has adopted a marriage statute, which prohibits “a marriage between 2 individuals of the same sex.” 750 ILCS 5/212(4) (2004). Further, the statute defines marriage as “a legal relationship between one man and one woman.” Concerned with what this could mean for their future life together, James and Howard sue along with seven other similarly situated couples, under the full faith and credit clause of the federal constitution, to have their marriage recognized so that they can obtain the same benefits from Howard’s employer as their opposite-sex counterparts. The city defends saying that the full faith and credit provision of the U.S. constitution allows the Congress to set out how it will be applied, and that the Congress via the Defense of Marriage Act (“DOMA”), 28 USC § 1738C (2004)(originally passed in 1996), has decided not to require states to recognize same-sex marriages performed in other states. Determined to fight for what they believe and citing U.S. Supreme Court cases that have held miscegenation statutes to be unconstitutional and marriage to be a fundamental right, the couples claim that DOMA is itself unconstitutional, as a violation of the federal equal protection clause. What happens next will depend on how the federal courts, and ultimately the U.S. Supreme Court, probably six years down the line, interpret these laws. If the courts follow the miscegenation precedent given that the Supreme Court in Lawrence has recognized a liberty interest in same-sex relationships under the due process clause, the result will likely be that same-sex marriage will be allowed throughout the United States.

But those who oppose same-sex marriage also can read the writing on the wall. They will see the same scenario and try to reelect a sympathetic president to pack the courts with judges who will steer away from this outcome. Alternatively, they will try hard to obtain passage by two-thirds of the Congress and three-quarters of the states of a federal constitutional amendment barring same-sex marriage and making marriage strictly an institution between one man and one woman nationally. If the latter happens, federal law will have written into it a specific provision designed for no other purpose than to discriminate against
a single class of people. The next few years should be decisive in seeing how all this plays out. This is what gives me pause that the road ahead is clear but also full of pitfalls.