Will Massachusetts Abolish Marriage?

Dec. 24, 2003

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How many legs does a dog have if you call its tail a leg? That familiar fable, often attributed to Abe Lincoln, comes to mind when we contemplate the redefinition of marriage by the Massachusetts Supreme Judicial Court.

In a 4-3 decision released November 18, the court acknowledged that for three centuries Massachusetts defined civil marriage as stated in Black's Law Dictionary: "the legal union of a man and woman as husband and wife." The court then arrogantly determined that there is no "rational basis" for such a restrictive definition, which it said reflects a "destructive stereotype" about the instability of same-sex couples and their inability to procreate.

After pontificating in like vein for several pages, the court ordered that at the end of 180 days Massachusetts will have a new definition of marriage: "We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others."

That formula not only redefines marriage, but also spouse. Although spouse is a gender neutral word, federal law states the obvious: "The word spouse refers only to a person of the opposite sex who is a husband or a wife."

With five months to go before the Massachusetts decision becomes final on May 16, it's time to consider how such a radical change in the meaning of a word by one state will affect or be affected by the laws of Congress and the other 49 states, all of which adhere to the definition of marriage that Massachusetts just abolished.

Take one example. The Internal Revenue Code has provided since 1948 that "a husband and wife may make a single return jointly of income taxes." If Massachusetts law no longer recognizes the federal meaning of husband and wife, then Massachusetts couples, including opposite sex couples married after May 16, will no longer be entitled to file a joint federal income tax return.

Gay advocates want same-sex couples to claim the 1,049 benefits of marriage under federal law (referring to the 1,049 federal laws in which marital status is a factor, according to a 1997 General Accounting Office report). But what is likely to happen instead is that opposite-sex couples married in Massachusetts after the effective date will lose those same 1,049 federal benefits.

The 1,049 federal laws recognize and were intended to support marriage as the union of husband and wife, not the union of "two persons." In our federal system, Massachusetts may well be free to abolish the concept of husband and wife within its borders, but it is not free to label the civil union of "two persons" as a marriage entitled to federal recognition.

Once the highest court of a state declares that a husband and wife are no longer needed for a valid marriage, then whatever unions it creates are not real marriages, no matter what the state chooses to call them. A dog doesn't have five legs even if you call its tail a leg, and Massachusetts couples will have to

get married in another state in order to be assured of a marriage that other states and the federal government will recognize.

To try to avoid the consequences of what Massachusetts House Speaker Tom Finneran said is a decision that has "legal, moral, and social considerations for 270 million Americans, not just 6 million people in Massachusetts," the state senate has asked the state supreme court for an advisory opinion about whether gay civil unions might be an acceptable substitute for gay marriage.

The senate's request deceptively refers to its proposal as "civil unions," but in fact it is identical in every respect to the court's redefinition of marriage as the "union of two persons." The senate's proposal does not merely create a separate legal category giving civil unions the benefits of marriage as does the law that Vermont Governor Howard Dean signed in 2000.

The proposed Massachusetts bill states categorically that a civil union is "equivalent to marriage and shall be treated under law as a marriage," and that "all laws applicable to marriage shall also apply to civil unions." The bill states that "the term marriage as it is used throughout the law shall be construed to include marriage and civil union."

This proposed Massachusetts bill further declares: "It shall be an unlawful practice for any person to discriminate on the basis of a person's being joined in a civil union rather than a marriage." Note the broad sweep of the restriction placed on "any person."

Logic dictates that if a civil union is no less than a marriage, then marriage is no more than a civil union. In either case, this legal status should not be recognized as valid outside of Massachusetts, and if opposite-sex couples want to be recognized as married by the federal government and by the other 49 states, they will have to travel to another state to pronounce their marriage vows.