

***Challenging Claims of Judicial Tyranny:
Testimony to the United States Senate Judiciary Committee***

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In announcing his support for the Federal Marriage Amendment, which would ban marriage for same-sex couples and jeopardize more limited benefits like health insurance for domestic partners, President Bush portrayed the Massachusetts Supreme Judicial Court as an anti-democratic rogue elephant run amok: “Activist judges...have made an aggressive attempt to redefine marriage.”¹ In his State of the Union Address, President Bush even charged the court’s judges with “forcing their arbitrary will upon the people.”²

President Bush’s denunciation of activist judges is particularly rich coming from a man who would not occupy the Oval Office were it not for the intervention of a bitterly divided U.S. Supreme Court in *Bush v. Gore*, a ruling that ignored the will of the American people as expressed in the popular vote.

But President Bush’s charge of judicial tyranny in Massachusetts also echoes a broader theme his far right base has deployed frequently of late. The day after Massachusetts’ high court legalized marriage equality for same-sex couples, U.S. House Majority Leader Tom Delay pushed the U.S. Constitutional amendment, arguing it’s the only option “[w]hen you have a runaway judiciary that has no consideration of the Constitution of the United States..”³ Other conservative politicians have joined this chorus, as have the anti-gay “family” groups driving the anti-family constitutional amendment.

The Massachusetts Family Institute organized rallies in cities throughout Massachusetts titled, “Americans for God, home and country: Let the people decide,” as if gay and lesbian people are against all these things. The Traditional Values Coalition issued “A Call to End Judicial Tyranny!” urging Congress to pass a law prohibiting the U.S. Supreme Court from ruling on homosexuality, abortion, and other right-wing obsessions. Bills restricting courts from ruling in certain areas have already been introduced in some state legislatures, and Pat Buchanan has also

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*James Madison
The Federalist No. 10*

¹ The White House, Office of the Press Secretary (2004, February 24). Remarks by the President.

² Kornblut, A. (2004, January 21). Bush demonstrates willingness to tackle divisive cultural issues. *Boston Globe*.

³ Mason, J. (2003, November 19). Texans urge ban on gay unions. *Houston Chronicle*.

endorsed them. Such proposals would overturn the principle of judicial review established two centuries ago in *Marbury v. Madison*.

Such reactionary proposals and demagoguery are expected from the anti-gay industry, for which divisive wedge issues are a cash cow. However, Americans should expect better from their elected officials, especially their President.

Some facts:

- Six of the seven “renegade judges” in Massachusetts were appointed by Republican governors
- Seven of the nine U.S. Supreme Court justices were appointed by Republican presidents
- Of 13 federal appeals courts, nine have majorities of Republican appointees, two have majorities of Democratic appointees, and two are split evenly between Republican and Democratic appointees
- These purported “activist” courts have struck down many policies that enjoy strong public support, including environmental regulations, campaign finance restrictions, gun control, and even parts of the Violence Against Women Act

It is the courts’ job to determine whether laws are equitable, even if the law or practice in question has been accepted for a long time.

In charging judicial tyranny, anti-gay groups appeal to populist sentiment, arguing that legislatures should decide whether or not to provide protections to same-sex couples, not courts. But many of these same anti-gay groups have gone to court to challenge laws passed by legislatures that they do not agree with, appealing to legal or constitutional principles over the heads of the elected representatives of the people. Among those praising President Bush’s call for a constitutional amendment was Jay Sekulow, chief counsel of the American Center for Law and Justice, a law firm founded by the Rev. Pat Robertson.⁴

President Bush argued that any amendment passed by Congress “should fully protect marriage while leaving the state legislatures free to make their own choices in defining legal arrangements other than marriage.”⁵ Anti-gay groups backing the Federal Marriage Amendment say that this amendment would allow legislatures to pass domestic partner and civil unions policies.⁶ Sekulow, the Alliance for Marriage, and other anti-gay activists imply that if legislatures choose to adopt more limited forms of partner recognition short of marriage, this will be acceptable to them. They also portray courts as anti-democratic, as compared with legislatures, which are allegedly more democratic. However, when anti-gay activists disagree with policies passed by legislatures, they have no problem going to the courts for redress. At least 15 times in recent

⁴ Loven, J. (2004, February 29). Congress not rushing gay marriage ban. Associated Press.

⁵ Bush, G.W. (2004, February 25). President calls for constitutional amendment protecting marriage: Remarks by the President. Office of the Press Secretary: The White House. Retrieved March 2, 2004, from <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>

⁶ Alliance for Marriage. (n.d.). Multicultural coalition reintroduces federal marriage amendment in Congress: strong bi-partisan sponsorship reflects the fact that the future of marriage in America is more important than partisan politics. Author. Retrieved March 2, 2004, from <http://www.allianceformarriage.org/reports/fma/fma.cfm>

years anti-gay groups, including Sekulow's legal organization, have challenged in court more limited forms of same-sex partner recognition passed by city councils and legislatures.⁷

Americans do not always agree with court rulings, and conservatives' claims of judicial tyranny are no more than a straw man. Their real objection is to legal equality for gay and lesbian people. All elected officials take an oath to uphold the Constitution, including its guarantees of liberty and equality for all (not just heterosexuals), and respect for the rule of law.

Conclusion

With time and public education, a majority of Americans will understand why same-sex couples deserve equal protection under the law, including equal access to civil marriage. In Massachusetts and three other states, such majorities already exist. However, the rights of members of a stigmatized minority should not be determined by the prejudices of the majority.

Founding father James Madison warned, "Measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." In other words, majority rule, unchecked, can lapse into majority tyranny.

Prejudice or ignorance should never determine public policy. Anti-gay ballot measures like that proposed for Massachusetts—in which a majority decides whether to grant or withhold individual rights in a secret ballot—violate this fundamental principle.

Courts have a duty in our system of government to protect the civil rights of minority groups from being restricted by an "overbearing majority." The American system of government was designed that way; it's deliberate. It is the courts' job to determine whether laws are equitable, even if the law or practice in question has been accepted for a long time.

Courts defend justice when they courageously stick with constitutional principles—as Massachusetts' high court did in the marriage case—without regard to the politics or the popularity of their decision. This is the American system of government at its best.

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⁷ Such challenges have overturned domestic partner policies in Atlanta, GA; Minneapolis, MN; Arlington County, VA and Massachusetts (all final) as well as Philadelphia (on appeal). Ten other legal challenges were unsuccessful. Source: Gossett, Charles. (1999, Sept. 4). "Dillon Goes to Court: Legal Challenges to Local Ordinances Providing Domestic Partnership Benefits." Paper presented to the annual meeting of the American Political Science Association. Atlanta, GA. Updated in personal communication with Charles Gossett, October 2002.