MY VIEW

Romney is wrong; P'town was right

By ARTHUR RYMAN

Holding that discrimination against couples on the basis of their sexual orientation violates the Massachusetts Constitution, the Supreme Judicial Court ordered marriage licenses issued, but Gov. Romney is not done warring against single-sex marriage.

The governor failed to stop enforcement of the SJC decision and failed to delay it. His religious allies failed to get the courts of the United States to override or stay the decision on trumped-up federal grounds claiming the court denied a Republican form of government to the good people of Massachusetts.

Courts upholding the rights of individuals and minorities represent part of a "Republican form of government," not a violation of it. Courts correcting bad law, including laws made by the court itself, as the Supreme Court did in Brown v. Board of Education, are sometimes castigated as "activist," but they are an essential part of decent government.

Courts with authority to strike down discriminatory laws are the last defense of individuals and minorities out of step with the rest of us. Segregationists may rant about Brown, but they need a constitutional supermajority to send us back to the darkness of Plessy v. Ferguson.

Gov. Romney, desperate to contain a rising tide of decency in the treatment of people who are sexually different from himself, enlisted the attorney general of the commonwealth in his war by getting him to instruct license-issuing clerks not to extend to single-sex couples from other states the same privileges and immunities Massachusetts now affords its own citizens.

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The attorney general threatens to invoke a statute adopted in a 1913 anti-civil rights campaign. It was part of the American apartheid movement. Klan stuff. The statute was intended to prevent mixed-race couples from marrying.

Since the Salem debacle there are relatively few blights on the honor of the state of Massachusetts in the area of civil rights. The 1913 statute is one of them. It was unconstitutional under both the laws of the United States and the laws of the commonwealth when it was adopted, and it is unconstitutional now. The attorney general should know that as well as legal scholars do, and he has the duty to prevent its enforcement. But he has enlisted in Gov. Romney's campaign to keep homosexual relationships illicit and unequal.

The U.S. Supreme Court held that the privileges and immunities clause of the U.S. Constitution stops a state from denying to nonresident Americans privileges and immunities that it grants to its own citizens. In 1980 Kathryn Piper, a lawyer then living outside New Hampshire, was denied a license to practice law in that state because, under New Hampshire laws, only citizens resident in New Hampshire could be lawyers in the state's courts. Piper sued. The U.S. Supreme Court sustained her suit. She got to seek her license to practice law in New Hampshire. Piper v. New Hampshire told us the privileges and immunities clause has teeth.

New Hampshire had a lot more reason to try to exercise authority over out-of-state lawyers acting in its courts than Massachusetts has to deny opportunity to out-of-state couples who want to get married here. But even New Hampshire's interest in regulating the local bar took a back seat to the right of Americans to travel, live and do business anywhere they choose in the United States.

Massachusetts can't offer its citizens a marriage license that it denies to those whose home is another state without violating the U.S. Constitution and contravening Piper v. New Hampshire. Gov. Romney certainly should be aware that residence requirements, even for the office of governor where they have some legitimacy, have little real significance in a country that affords its citizens the right to travel and to make a living and to be married in states other than those of their nativity. He has benefited mightily from the interstate freedom of America.

The SJC decision asks us to view as a violation of the Massachusetts Constitution a denial of the right to marry to any couple regardless of sexual orientation. It is not just for "home folks."

Massachusetts has no interest in enforcing the restrictive policies of other states – certainly no interest requiring us to deny to residents of other states the right to be married while they are in Massachusetts, even if they enjoy the marital state for only a few hours before leaving us. What other states may do about recognizing their status when they go back, if they go back, is not the concern of Massachusetts law.

A case can be made that even inquiring into the residence or nativity of an applicant for a marriage license is a violation of the right to privacy. Asking the question implies there is a difference in law or fact between those who are and those who are not "home folks."

The attorney general is wrong. The Provincetown clerk was right. The governor hasn't been right yet.

Where is the ACLU when you need it?

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