

## Arguing Over A Word

### Supreme Court Justices Hear Arguments On Whether State Must Allow Marriage For Same-Sex Couples, Not Just Civil Unions

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"We're not talking about granting rights and benefits; we're talking about a word."

So argued Assistant State's Attorney General Jane R. Rosenberg before the state Supreme Court Monday, in seeking to convince the justices that civil unions offer same-sex couples all the same protections and obligations of marriage without the title, "married."

Attorney Bennett Klein, on behalf of eight same-sex couples who were denied marriage licenses by Madison Town Clerk Dorothy Bean, countered that anything short of marriage is not enough.

"Here the lesbian and gay couples have been relegated to a less prestigious, less advantageous, institution," Klein argued.

It will be months before the court rules on whether the institution of marriage in Connecticut must embrace all couples, and not just those comprising one man and one woman.

Marriage is so traditionally rooted in the union of a man and a woman that no appellate court in the nation has yet ruled that same-sex couples have a fundamental right to wed. And if civil unions confer all the same rights and responsibilities, what's the big deal?

Barbara Levine-Rittman answered with an anecdote.

She is one of the plaintiffs, involved in a relationship with Robin Levine-Rittman since 1989. She is a breast cancer survivor who returned to the hospital last month for a screening. Hospital staff said they had to update her information. They asked her marital status. What the heck, Levine-Rittman said she thought to herself, civil unions have been an institution here for 18 months.

"I'm in a civil union," she told the staff person. The woman told her that was not an option in her computer, "So I'll just put you in as single," Levine-Rittman quoted her as saying.

Plaintiffs Jeffrey Busch and Stephen Davis also were in the courtroom of the Supreme Court Monday. They, too, have been together since 1989, and have a 4-year-old son, Elijah. They have formalized their relationship with a civil union for Elijah's sake, to maximize their benefits as parents, but the ceremony was so unsatisfying neither could recall the exact date.

"Civil unions serve to stigmatize us; they provide second-class status," Busch said.

When Elijah cut his eyelid in an accident at school, and Busch rushed him to the hospital, he had to fill out a form that did list "civil union" as an option. Rather than feeling gratified, Busch felt his privacy had been invaded. "Here this doctor I had never met, who was about to perform an operation on Elijah, was finding out my sexual orientation. It didn't belong."

All eight same-sex couples walked into the Supreme Court building Monday to hear arguments on whether they should be allowed to marry. They walked away hopeful.

"It seemed like a very open group of justices," Joanne "Jodi" Mock, longtime partner of named plaintiff Elizabeth Kerrigan, said on the steps of the building where their cause will be decided.

The legal issues are multifaceted, and the Gay & Lesbian Advocates & Defenders law firm representing the couples attacked on so many fronts that Justice David M. Borden at one point told Klein he was "riding two horses."

Borden was referring to Klein's contention that same-sex marriage was both a fundamental right and guaranteed under the sexual anti-discrimination bans of the state constitution.

Klein had argued that under Connecticut's constitution, barring same-sex marriage violates the sex discrimination clause, saying a woman who wants to marry another woman is denied the same right a man has to marry a woman, and vice versa.

Klein also argued that the couples are being discriminated against based on sexual orientation.

But the argument the justices seemed most intrigued by is whether sexual orientation entitles the couples to status as a "suspect class" of people, entitled to greater protection due to a history of long-term discrimination and political powerlessness.

If the justices determined that gay and lesbian couples fall into this status, they would more intensely scrutinize the state's motives in distinguishing between civil unions and marriage, and whether they were rational, and narrowly tailored. It was this type of analysis that formed the underpinnings of the 2003 Massachusetts Supreme Court ruling that afforded same-sex couples the right to marry.

The highest state courts of New Jersey, the state of Washington and California did not place same-sex couples in a protected or "suspect" status in reaching their edicts extending the rights of marriage to same-sex couples via civil union or domestic partnership laws.

Rosenberg argued that same-gender couples are far from politically powerless, and have made "significant advances" in recent years, noting the passage in Connecticut two years ago of the first civil union law in the country that was not compelled by a court order. She said she wouldn't be surprised if sexual orientation was soon grafted onto the constitution's equal protection provisions.

"Is that your argument - give them more time and they'll do better?" Justice Richard N. Palmer queried. "For many years, gays and lesbians have been subjected to significant discrimination."

Justice Flemming L. Norcott Jr. drew laughter when he interjected, "If they were doing better, they would have passed that bill across the street."

He was referring to a bill that would have included same-sex couples in the state's civil marriage statutes. The bill cleared the judiciary committee by a vote of 27-15, catching off-guard lawmakers who thought it would die in committee. Faced with requests for more time to think and consult their constituents, judiciary committee Chairmen Sen. Andrew McDonald and Rep. Michael Lawlor said last Friday they would not force a vote this session.

Rosenberg argued that rather than being deprived of rights, same-sex couples have been granted new privileges.

"No rights have been taken away from this group," she argued. "They have been granted a license with all the rights and benefits of marriage. What's different is their license happens to say civil union and not marriage.

"Is the legislature constitutionally required to use the word 'marriage' when referring to the packaging of benefits the legislature has given to same-sex couples?" she asked. "There is nothing in the words 'civil union' that implies anything inferior."

Rosenberg urged the high court to steer clear of what should be a public policy debate in the legislature, and not "enshrine one policy choice as a matter of constitutional law," quoting a 1995 ruling of the court that welfare is not a fundamental right under the Connecticut Constitution.

Aside from Norcott's wry observation, the only levity in Monday's marathon, three-hour argument, came when Madison town attorney Judith Ravel walked to the podium for a brief defense of acting Town Clerk Dorothy Bean, the unwitting actress cast in this constitutional drama.

Ravel said Bean could not be expected to parse out a constitutional or statutory analysis when confronted with the crowd of same-sex couples who walked through her office door one summer day in 2004, seeking marriage licenses.

"She did the only thing she could do, which was to follow the explicit instructions of the attorney general's office," Ravel said. "If the court changes the rules, she will follow the new instructions."

Senior Associate Justice David M. Borden, presiding over Monday's historic hearing, assured Ravel they didn't believe anything to the contrary.

"Well, Ms. Bean got served and she didn't like it," Ravel retorted, bringing a homespun moment to the nationally watched case.

There is a certain irony to the fact that being labeled a suspect class - a group long discriminated against and reviled - could be the ticket to marriage for same-sex couples, but Kerrigan Monday readily said, "We'll take it.

"We've lived the hard life," she said of her 13-year relationship with Mock. Remnants of it exist still.

"Even walking out of here, Jody went to take my hand and I pulled away," Kerrigan said. "You don't walk down the street holding hands."

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