

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
NO. 01-1647-A

HILLARY GOODRIDGE, et al.,

Plaintiffs,

-VS-

DEPARTMENT OF PUBLIC HEALTH, et al.,

Defendants.

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**DEFENDANT-INTERVENORS' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION**

Now come Defendants-Intervenors, Ambassador Ray Flynn and Thomas A. Shields, and move this Court to dismiss the above-captioned case, for the reason that there is no subject matter jurisdiction in this Court (or any other) that would allow it to entertain, let alone grant, Plaintiffs' petition.

A Memorandum in support of this Motion is attached hereto.

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MEMORANDUM

I. INTRODUCTION

Only the people of the Commonwealth of Massachusetts possess the authority to amend the Constitution to redefine marriage. The courts have no such authority, for “marriage” is a term that was included in the Constitution by the people of this Commonwealth, there inserted to describe and distribute the jurisdiction over that relation granted to the various branches of government. Because the word “marriage” was enshrined in the Constitution by the people, that word must under the rules of construction long announced by the Supreme Judicial Court be interpreted and maintained by reference to the sense in which that word would have been understood by those who voted to ratify the Constitution.¹ Allowing any alternative to that rule of construction is to concede propriety to the deviant notion that the government may amend by fiat the very document that stands to govern it.

II. ARGUMENT

A. **Operative terms of the Constitution may not be redefined by government, but rather only by the people through constitutional amendment.**

1. **Sovereignty resides in the people, who control the content of the Constitution.**

Article VII of the Declaration of Rights states that “the people alone have an incontestable, unalienable, and inalienable right to institute government.” Article IV thereof states that the “people of this commonwealth have the sole and exclusive right of governing themselves.” Quite consistently, then, Article XVIII exhorts that “[t]he people ... have a right to

¹ The consensus of human civilization that would have informed the understanding of those ratifying the Constitution is adequately presented in the now well-known case of *Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. 48 (1810). “Marriage is unquestionably a civil contract, founded in the social nature of man, and intended to regulate, chasten, and refine, the intercourse *between the sexes*; and to multiply, preserve, and improve the species. It is an engagement, by which *a single man and a single woman*, of sufficient discretion, *take each other for husband and wife.*” *Id.* at 52 (emphasis added).

require of their lawgivers and magistrates, an exact and constant observance of [the fundamental principles of the Constitution], in the formation and execution of the laws necessary for the good administration of the commonwealth.” The branches of government in Massachusetts derive their authority exclusively from the Constitution, itself containing the directives of the people. “Sovereignty in this commonwealth resides in the people.” *Loring v. Young*, 239 Mass. 349, 373, 132 N.E. 65 (1921). The will of the people is expressed in the Constitution, and “[w]hen their will in this regard ... has been ascertained, it must prevail.” *Id.*

A written constitution is the fundamental law for the government of a sovereign State. It is the final statement of the rights, privileges and obligations of the citizens and the ultimate grant of the powers and the conclusive definition of the limitations of the departments of State and of public officers. In its grants of powers, the bounds set for their exercise, the duties enforced and the guarantees established are found the constitutional liberty of the individual and the foundation for the regulated order and general welfare of the community. *To its provisions the conduct of all governmental affairs must conform. From its terms there is no appeal. Such a great charter cannot itself in the nature of things be made subject in its “meaning or effect” to another instrument.* In that event it is not final and that other instrument becomes paramount.

Id. at 376-77; see, also, *Opinion of the Justices to the Governor and Council*, 233 Mass. 603, 611, 125 N.E. 849 (1920) (emphasis added).

It is a necessary consequence of these principles that only the people may amend the content of the Constitution. For a branch of government to redefine the terms found in the constitution serves as a revolt from the discipline of that document; it is an inversion of the relationship. The government, having its powers delegated to it by the Constitution and being subject to the provisions thereof, is in no position to alter the Constitution to which it is subservient. As a servant does not instruct his master, so the Government may not manipulate the meaning of the terms of the Constitution so as to change its content from that which the people approved. See *Loring, supra*.

2. “Marriage” was placed in the Constitution by the people.

Part II, c.3, art. 5 of the Constitution of this Commonwealth, reads as follows: “All causes of marriage, divorce, and alimony, and all appeals from the judges of probate shall be heard and determined by the governor and council, until the legislature shall, by law, make other provision.” The people thereby delegated jurisdiction over marriage to the branches of government in a limited manner. The people determined that the realm of marriage was worthy of isolated treatment separate from the general category of matters otherwise left to more summary or general treatment by the government. In so granting that limited authority to the various branches of their government, “marriage” was given specific constitutional identification. So enshrined, marriage is therefore not amenable to redefinition by the branches of government which were by this provision granted measured authority to regulate it. Such a change in the fundamental order of the Commonwealth is only available through an amendment by the people. See *Loring v. Young*, 239 Mass. 349, 373, 132 N.E. 65 (1921), citing Mass. Const., Pt. I, art. 7.

3. Plaintiffs’ requested relief requires redefining marriage.

The primary remedy requested by the Plaintiffs is that the Court:

Enter a declaratory judgment that the exclusion of the Plaintiff couples and other qualified same-sex couples from access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage, violates Massachusetts law.

Complaint, at 31. This requested remedy cannot be granted without redefining the term “marriage,” as it was understood by the voters who adopted the Massachusetts Constitution. Indeed, the Supreme Judicial Court expressly recognized that it must redefine “marriage” in order to grant the requested relief:

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.

Goodridge v. Department of Public Health, 440 Mass. 309, 337, 798 N.E.2d 941 (2003) (emphasis added).

Not only did the Court's redefinition serve as a departure from the common law and historic societal consensus, more significantly (for present and constitutional purposes), it served as a departure from that understanding of marriage which was ratified as a component of the people's Constitution. While the Supreme Judicial Court was silent as to this aspect of its decision, the trespass was nonetheless accomplished. The active participation of the judiciary in the development of the common law does not and can not authorize the constitutional reordering that the Plaintiffs here request, and that the higher Court purported to accomplish. The courts of Massachusetts are themselves given their life and authority by the Constitution; that document is not subject to change by the courts it governs.

C. The branches of government are without authority to redefine terms contained in the Constitution.

In *Opinion of the Justices to the House of Representatives*, 247 Mass. 583, 143 N.E. 142 (1924), the Supreme Judicial Court was faced with the question of whether the General Court had the power under the Constitution to enumerate and classify those who are "legal voters," as that term is found in the Constitution. The Supreme Judicial Court allowed the Legislature the ability to engage in the enactment of a requirement that those whom the Constitution intended to be "legal voters" must register with the state, so that their qualifications as constitutionally permitted "legal voters" could be determined and recorded for administrative purposes, before these persons would be allowed their voting status. The Court made clear that these administrative requirements are indeed acceptable, for the reason that they "would not change in

any respect, the meaning of the words as found in articles 21 and 22 of the Amendments to the Constitution” relating to voters. *Id.* at 588. On this consideration was hinged the Court’s conclusion. That is, because no redefinition of a constitutional term was being effectuated, the action was proper.

In *Opinion of the Justices to the Senate*, 226 Mass. 607, 115 N.E. 921 (1917), the SJC applied this same principle in instructing against the intended action of the General Court in the circumstance where it sought to redefine a term in the Constitution. In that case, the Legislature sought to expand the category of those within the term “people” whom the Constitution established to be eligible to vote to amend the Constitution. The Court explained:

It seems indisputable that there is no power under the Constitution, except the sovereign people acting in accordance with their self-imposed, limiting methods of procedure, to enlarge the electorate so as to include as voters persons not eligible to vote upon amendments to the existing Constitution. This is necessarily so, whatever may be the power of the Legislature to define words for the purpose of its own legitimate enactments. The Legislature can proceed only under the Constitution. It would be contrary to its duty to that Constitution to provide for its revision or alteration by a body of electors, whose qualifications were different from those ascertained by the terms of that Constitution.

Id. at 612.

A particularly instructive and relevant application of this principle is likewise found in the discussion in *Opinion of the Justices to the Senate*, 324 Mass. 746, 85 N.E.2d 761 (1949). The matter in controversy discussed in that Opinion was a proposed bill in the Senate which sought to expand the definition of “public highways or bridges” as those words are contained in Article LXXVIII of the Amendments to the Constitution. *Id.* at 747. The proposed expanded definition that the Senate sought to implement would have demanded that the constitution’s terms “public highways and bridges” be understood to include “subways, tunnels, viaducts,

elevated structures and rapid transit extensions.” *Id.* at 748. The Court condemned this act of “legislative fiat,” *id.*, which sought to so amend the people’s Constitution:

The function of a written constitution adopted by the people is to establish by their votes an objective standard of conduct by which all departments of the government, executive, legislative and judicial alike, shall be bound, until the constitution is changed by another vote of the people. *In order that this function may be performed, and that the will of the people may prevail, it is necessary that the words inserted into the constitution by their votes be interpreted as they meant them to be interpreted at the time and in the circumstances of their adoption.* Accordingly, this court said in *Attorney General v. Methuen*, 236 Mass. 564, at page 573, “An amendment to the Constitution is one of the most solemn and important of instruments.... Its words should be interpreted in ‘a sense most obvious to the common understanding at the time of its adoption,’ because it is proposed for public adoption and must be understood by all entitled to vote.” And in *Yont v. Secretary of the Commonwealth*, 275 Mass. 365, at pages 366-367, this court said that an amendment to the Constitution ‘was written to be understood by the voters to whom it was submitted for approval. It is to be interpreted in the sense most obvious to the common intelligence. Its phrases are to be read and construed according to the familiar and approved usage of the language.

Id. at 748-49 (emphasis added).

Applying these considerations, the Court stated that the legislature’s redefinition would not give to those words “their natural and obvious sense according to common and approved usage,” *id.* at 750, and that the “[t]he voters of the Commonwealth could not have had any such meaning in mind when they adopted” that provision of the Constitution. *Id.*. The court stated: “[t]he Legislature is bound by that article as adopted and cannot now by enacting a declaratory statute change the meaning of the article so as to permit such diversion.” *Id.* at 752.

Making application to the case *sub judice*, there is no doubt whatsoever by the Supreme Judicial Court, this Court, or any of the parties herein that the definition of “marriage” as understood by those who approved the Constitution did not include the notion of a union of individuals of the same sex.² Indeed, the Supreme Judicial Court in its decision above

² See *supra*, at 2, fn. 1.

forthrightly calls its construction of marriage a “reformulation.” *Goodridge*, 440 Mass. at 343; see, also, *id.* at 337 (noting that the Court’s decision accomplishes “a significant change in the definition of marriage”). This “reformulation” gave the term “marriage” a “meaning which would never [have] occur[red] to a voter in the polling booth [in 1780].” *Opinion of the Justices*, 324 Mass. at 750. Stated plainly, it effectively amended the Constitution, and specifically Part II, c. 3, art. 5, by redefining what the people there gave to the government to regulate.³ This is just that form of proceeding which is condemned elsewhere by the Supreme Judicial Court, and indeed also by the very principles of constitutionalism.

“[The Constitution’s] words should be interpreted in a sense most obvious to the common understanding at the time of its adoption, because it is proposed for public adoption and must be understood by all entitled to vote.” *Cohen v. Attorney Gen.*, 357 Mass. 564, 571, 259 N.E.2d 539 (1970) (emphasis removed), citing *Attorney Gen. ex rel. Mann v. Methuen*, 236 Mass. 564, 573, 129 N.E. 662 (1921); see, also, *Opinion of the Justices to the Senate*, 413 Mass. 1201, 1204, 595 N.E.2d 292 (1992) (same); *Opinion of the Justices*, 308 Mass. 619, 626, 33 N.E.2d 275 (1941) (same); *Loring*, 239 Mass. at 372 (same). As it is indisputable that those adopting the Constitution did not understand marriage to comprise the configuration Plaintiffs now petition, there is no jurisdiction in this Court to honor their request. The absence of authority to pursue the enterprise the Plaintiffs here commend to the Court demands the case be dismissed.

D. A decision issued absent subject matter jurisdiction is void.

A judgment is void if the court from which it issues lacked jurisdiction over the subject matter. *Bassett v. Blanchard*, 406 Mass. 88, 90, 546 N.E.2d 155 (1989). The judicial branch, no less than the executive and legislative branches, is without authority to amend the Constitution.

³ There is no necessity for the Court to have made direct reference to Part II, c. 3, art. 5 to nonetheless amend it. That the Court determined to avoid a specific reference to that Constitutional provision is immaterial; the effect on it was just as sure.

Because the Plaintiffs' requested remedy entails an amendment to the Constitution, there is no subject matter jurisdiction in the courts at any level to grant the requested relief.

The issue of subject matter jurisdiction must be decided, regardless of the point at which it is first raised, *Litton Business Systems, Inc. v. Commissioner of Revenue*, 383 Mass. 619, 622, 420 N.E.2d 339 (1981), and even when the delay in reaching the issues may pose a number of practical problems. *Jensen v. Daniels*, 57 Mass. App. Ct. 811, 820, 786 N.E.2d 1225 (2003). "Superficial appearances cannot clothe with the attributes of law something in substance vain and inoperative." *Opinion of Justices to the House of Representatives*, 262 Mass. 603, 606, 160 N.E. 439 (1928). A court "cannot convert into a law something in itself ineffectual." *Id.*⁴

At no point in this litigation has any party raised the constitutional subject matter jurisdiction deficiency herein discussed, nor has this Court or the Supreme Judicial Court given attention to this aspect of its undertaking. It is appropriate even at this late hour for this Court to now examine this issue. At no point during the progress of litigation is it too late to consider whether there is absence of authority to proceed.

⁴ Apart from the foregoing considerations, it bears mention (particularly in light of the continual public broadcast of this confusion on the matter) that the Supreme Judicial Court's declaration does not require anything other than a declaration from this Court. Not only is an injunctive order not called for by the Supreme Judicial Court's decision in this case, the Plaintiffs herein have never requested such relief. Moreover, even if an injunction of some sort had been requested by Plaintiffs or ordered by the SJC, such equitable relief (to the extent it conformed to the declaration of the Court above) would not necessarily require same-sex marriage licenses to issue or be recognized by the Defendant Department of Health. A halt altogether on recognition of marriage of any sort by the Defendant would as well satisfy the declaration issued by the SJC. No definite practical result is called for by the higher Court's (unauthorized) declaration.

III. CONCLUSION

Does “marriage” in Pt. II, c. 3, art. 5 of the Constitution mean something different after the Supreme Judicial Court’s decision above, than it did at the time that the people ratified this provision as part of their Constitution? If this is the ostensive effect of the higher Court’s decision, it stands as a paradigmatic instantiation of unconstitutional usurpation of authority belonging exclusively to the people. Such a result being precisely what the Plaintiffs have requested, it demonstrates why there can be no jurisdiction in this or any Court to entertain their lawsuit.

For the foregoing reasons, Plaintiffs’ Complaint should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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* Pending admission *Pro hac vice*

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing Motion to Dismiss was delivered by hand this 4th day of May, 2004, upon the following counsel:

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