

Excerpt – CORRUPT BARGAINS, Chapter 4

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Mitt Romney seemed comfortable as a group of gay Republicans quizzed him over breakfast one morning in 2002. Running for governor of Massachusetts, he was at a gay bar in Boston to court members of [the homosexual] Log Cabin Republicans. When the discussion turned to a court case on same-sex marriage that was then wending its way through the state’s judicial system, he said he believed that marriage should be limited to the union of a man and a woman. But, according to several people present, **he promised to obey the courts’ [sic] ultimate ruling and not champion a fight on either side of the issue.**

“I’ll keep my head low,” he said, making a bobbing motion with his head like a boxer, one participant recalled....[Romney] ... promised the Log Cabin members that he would not champion a fight against same-sex marriage.... And, in the aftermath of the Massachusetts court decision, Mr. Romney, though aligning himself with the supporters of a constitutional amendment, did order town clerks to begin issuing marriage licenses to same-sex couples. Some members of Log Cabin Republicans say that in doing so, **he ultimately fulfilled his promise to them** despite his own moral objections.

— Michael Luo, *New York Times*, September 8, 2007

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**The Massachusetts Supreme Judicial Court’s claim to reformulate the definition of marriage was a legally insignificant action that expired on May 17, 2004.**

— Attorney “Robert Paine”

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We need an amendment that restores and protects our societal definition of marriage, blocks judges from changing that definition and then, consistent with the principles of federalism, leaves other policy issues regarding marriage to state legislatures. **The real threat to the states is not the [federal] constitutional amendment process, in which the states participate, but activist judges who disregard the law and redefine marriage in order to impose their will on the states, and on the whole nation....**

At the heart of American democracy is the principle that the most fundamental decisions in society should ultimately be decided by the people themselves. Surely the definition of society’s core institution, marriage, is such a decision.

Let me conclude with this point: Despite the warning signs, the Massachusetts Legislature hesitated, and refused to act. But the court had no such reluctance, and acted decisively. Now on the defensive, the legislature has begun the long and difficult process of amending the Constitution to undue [sic] what the Court has done. But it may soon be too late.

— Mitt Romney, testimony, U.S. Senate Judiciary Committee, June 22, 2004

Chapter 4

How Gay Marriage Began in Massachusetts: Governor Romney Bowed to Judicial Tyrants

Massachusetts Supreme Judicial Court declares same-sex marriage a constitutional right

On November 18, 2003, the Massachusetts Supreme Judicial Court (SJC) informed the Massachusetts Legislature that the marriage statute’s clear application to only opposite-sex

couples was unconstitutional. The court's 4-3 majority advised the legislature to change the law within the next 180 days (by May 17, 2004) to allow same-sex couples to marry.

But during that six-month period, the legislature postponed, debated, and postponed – then finally dangled a cynical constitutional amendment that defined marriage as one-man/one-woman while also creating civil unions. (That amendment could not have taken effect for two years.) Essentially, the legislature bucked the court, refusing to follow its instruction to alter the statutes.

The Supreme Judicial Court knew it could not enforce its same-sex marriage ruling on its own, so it had told the legislature – *not the governor* – to act. But the legislature resisted. Given the unconstitutional nature of the ruling, plus inaction by the legislature, how was it that same-sex marriages began in Massachusetts?

Enter Mitt Romney. As governor, he had sworn an oath to defend the constitution. So how could he fail to block the rogue judges who were acting (in his own words) “outside of the law”? Why did he proceed *unconstitutionally* to implement same-sex marriage? 1

It appears Romney was keeping his pledge to the homosexual Log Cabin Republicans who had twice endorsed him. His longtime support of gay rights was playing out.

In 2002, “he promised [the Log Cabin group] to obey the courts’ [sic] ultimate ruling and not champion a fight on either side of the issue.” While he went on to make a show of working for a terribly flawed (“designed to fail”) constitutional amendment on marriage, at the same time he “order[ed] town clerks to begin issuing marriage licenses to same-sex couples. Some members of Log Cabin Republicans say that in doing so, he ultimately fulfilled his promise to them.” 2

But whatever his personal conviction was, his oath to uphold the constitution should have taken precedence over his pledge to homosexual activists. He was duty-bound to step up during this constitutional crisis and say “No” to the SJC. That is the purpose for the separation of powers: the executive branch should act as a check on the tyranny of another branch. What Thomas Jefferson wrote 3 about the U.S. Constitution applies equally to the Massachusetts Constitution (written by John Adams):

The Constitution . . . meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the Legislature and Executive in their own spheres, would make the Judiciary a despotic branch.

Also,

To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.

The concept of separation of powers with checks and balances – embedded in the U.S. and Massachusetts Constitutions – was apparently not understood by Romney or his legal staff 4 (or perhaps willfully ignored). Romney simply blamed the court for acting, and the legislature for failing to act. But he has never accepted responsibility for the same-sex marriages beginning.

At the peak of the crisis (between November 2003 and May 2004), Romney redirected citizens’ attention to the hopeless effort to pass a federal marriage amendment, and to the equally unlikely effort to pass a state constitutional amendment on to the voters. 5 His only solution for preserving

marriage was to “*Let the people vote!*” He wanted to protect “democracy” ... though he did not seem to care about upholding the constitution. Meanwhile, his executive office was busy behind the scenes implementing the unconstitutional marriage ruling.



Citizens' banners outside Boston's historic Faneuil Hall during a pro-family rally on May 14, 2004, just days before the same-sex marriages were to begin. Governor Romney failed to attend that rally (although it was co-sponsored by his supposed ally, the Massachusetts Family Institute). Article 8 Alliance activists brought their banners, including “*ROMNEY: Tell Judge NO. Separate But Equal Powers.*” Author (on far left) handed out “*Remove the Judges*” stickers. (MassResistance photo)

Mitt Romney wanted people to forget about his actions as governor during that constitutional crisis. He acted the role of a constitutional originalist opposed to judicial activism during his presidential candidacies.

His slight mention of same-sex marriage in his 2010 book, *No Apology*, comes in his declaration on the sanctity of the constitution:

There is a strain of thought among some liberals ... that advocates lowering the bounds of law and the Constitution in order to accommodate the sentiment and sensibilities about right and wrong held by the elite and wise. They **favor justices who will do “what they think is right” rather than what they know the law and the Constitution demand. This explains incongruous rulings on abortion and same-sex marriage** – they are clearly beyond the contemplation of the Constitution, but well within the sensibilities of select society....

Respect for the law will continue as part of our culture only so long as it extends to the entire Constitution. When justices breach the bounds of the Constitution and law, society may choose to follow them, with untold consequences for the national character....

[Also, Item 64 in his “Agenda for a free and strong America” at the end of the book:] **Appoint judges that follow the Constitution rather than invent a new one.** 6 [emphasis added]

How should citizens assess governors (or presidential candidates) who choose to obey rogue judges, rather than the constitution?

Romney's action and inaction on SJC ruling

Several news reports appeared describing Romney's emotional response to the SJC's release of its *Goodridge* ruling in November 2003. He was upset but did not announce a clear policy response.

In a sympathetic account at *National Journal*, Marc Ambinder reported that upon hearing the news of the ruling, Romney reacted as if he had been "hit in the gut":

The governor read a synopsis of the decision [the morning it came out], writing notes in the margin. An aide directed him to this sentence: "[It] is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."

That finding rejected the thrust of the state attorney general's main argument against gay marriage. The court also held that Massachusetts had scarred the children of same-sex couples by denying their parents access to the state benefits and recognition available only through lawful marriage. According to one of his aides, Romney, who is married to his high school sweetheart and has five sons, looked like he was "hit in the gut" when he read the court's conclusion: The state government had no "rational" reason for allowing only "opposite-sex couples" to marry. "Prejudices" alone, the court said, had blocked same-sex couples from marrying.... 7

Newsweek reported a similar tale:

Romney can place a date on the moment he took a stand against gay marriage. On Nov. 18, 2003, the Massachusetts Supreme Judicial Court upheld gay marriage in the commonwealth. **Romney's chief counsel, Daniel Winslow, recalls printing out the decision and carrying it to the governor's corner office. "It was as though he'd been punched in the solar plexus," Winslow tells NEWSWEEK. "I think he was stunned – and it was genuine, too, because it was in private."** Romney was reacting against liberal judicial activism as well as taking a position against gay marriage, say **his advisers, who do not wish to be identified discussing the candidate's thinking.** 8 [emphasis added]

(Winslow's own sincerity telling this tale might be questioned. See details below on his role implementing same-sex marriage.)

So, Romney reacted *emotionally* "against liberal judicial activism." But would he *act* in his constitutional role as governor "against liberal judicial activism"? What value was his "stand against gay marriage" if he did not also stand against this act of judicial tyranny?

The focus of this chapter is neither the governor's gut reaction nor his reasons for wanting to preserve marriage, but whether he fulfilled his sworn duty to defend the Constitution and the rule of law during this constitutional crisis.

If Governor Romney had truly wanted to uphold traditional marriage, the easiest way would have been to ignore the court's ruling. Why did he choose *not* to do so? Was he really committed to preserving marriage? Or to fulfilling promises he had made to his radical Log Cabin Republican allies? Was he relying on his pro-gay-rights legal counsel, Daniel Winslow?

It is telling that Governor Romney never allied publicly with any pro-traditional-marriage groups until he announced his support for the Massachusetts Family Institute’s VoteOnMarriage effort in June 2005 (a year after the same-sex marriages had begun). There were no bully-pulpit speeches about marriage, the out-of-control court, or amendments or bills he might be filing or supporting. He never attended a rally (excepting his own November 2006 photo-op rally as he prepared for his presidential run). His official statements on the ruling or on same-sex marriage were brief and weak. He did, however, issue many discretionary governor’s marriage licenses to same-sex couples! 9

His claim to be a strong advocate for traditional marriage rested entirely on his push for a constitutional amendment. The weakness of that approach is explained in Chapter 5.

What actually happened

The timeline in Chapter 7 makes clear Governor Mitt Romney’s role in creating same-sex marriage in Massachusetts.

Same-sex marriage was *not* created by the Supreme Judicial Court’s 2003 *Goodridge* ruling and is still (strictly speaking) *not* legal in Massachusetts. (As of 2022, the legislature still had not amended the marriage law to allow for same-sex couples.) 10

It was Governor Mitt Romney who was ultimately responsible for the same-sex marriages starting on May 17, 2004. The court had only issued an opinion and *advised* (since it could not *order*) the legislature to pass enabling legislation – which never happened. The court even acknowledged that it had no power to force the legislature to act. 11

When the legislature failed to change the marriage statute to allow same-sex couples to marry, Governor Romney took matters into his own hands. Working with his legal counsel and the attorney general’s office on how to implement what both the governor and attorney general referred to as the new “law,” Romney authorized his Department of Public Health to issue new sex-neutral marriage licenses. And through his chief legal counsel, he threatened to fire any town clerk or justice of the peace who failed to implement same-sex marriages. JPs were even warned by an official (apparently from the Massachusetts Commission Against Discrimination) that they could face a fine of \$25,000 to \$1 million if they refused to perform a same-sex wedding. No opt-out for religious reasons would be allowed. 12

Romney ignored pleas from conservative legal analysts and pundits, as well as concerned citizens, to defy the illegitimate ruling. He ignored calls to issue an executive order barring issuance of same-sex marriage licenses. He refused to support removal of the four rogue judges. (See the Appendix for reports and commentary from that period.)

His unnamed aides told *WorldNetDaily* (in July 2007) that,

... he believed he had no choice but to direct clerks and others to change state marriage forms to eliminate the “husband” and “wife” or “bride” and “groom” references and to begin registering “marriages” of same-sex couples.... A spokesman said while Romney felt passionately the court was wrong, his options were limited. He said Romney explored “every legal avenue” and concluded **the decision could only be resisted “at the price of constitutional government.”** 13 [emphasis added]

At the *price* of constitutional government? On the contrary, defiance of the ruling would have engaged the needed battle to *preserve* constitutional government. The *court* was the instigator of the constitutional crisis. The constitution was crying out for a proper response from the legislature and governor. In fact, Massachusetts *lost* any semblance of constitutional government because of Romney's actions in 2004. 14

From the Massachusetts Constitution: 15

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***... the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent.***

***– Part I, Article X***

***The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it.***

***– Part I, Article XX***

***In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.***

***– Part I, Article XXX***

***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.***

***– Part II, Ch. III, Article V***

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From the very start of the crisis, Romney accepted the notion that the court opinion was new “law.” His brief, weak statement on the day of the ruling implied that only an amendment to the constitution could answer the court’s action. Preserving marriage was, he said, no more important than guaranteeing “appropriate benefits” to same-sex couples:

I disagree with the Supreme Judicial Court. Marriage is an institution between a man and a woman. I will support an amendment to the Massachusetts Constitution to make that expressly clear. Of course, we must provide basic civil rights and appropriate benefits to nontraditional couples, but marriage is a special institution that should be reserved for a man and a woman. 16

In reports from the day after the ruling, it is clear that Romney had no conception of defying the ruling, but considered it “law” he had to implement. He viewed the court as rightful dictator on what was acceptable. His chief legal counsel, Daniel Winslow, 17 helped shape that understanding: ...

[See book for more.]

1 The legal analysis presented in this chapter and on the MassResistance website owes a huge debt to John Haskins, formerly with the Parents’ Rights Coalition of Massachusetts, and Massachusetts Attorney (pen name) “Robert Paine.” Brian Camenker

also deserves tremendous credit for establishing the Article 8 Alliance, the only group *opposing* a Constitutional amendment as the solution (practically or theoretically) to a tyrannical judiciary, and advocating removal of the four rogue justices who ruled for gay marriage.

2 Michael Luo, "Romney's Tone on Gay Rights Is Seen as Shift," *New York Times*, Sept. 8, 2007; <https://nyti.ms/2PPTeR0>.

3 Thomas Jefferson to Abigail Adams, 1804; and Jefferson to William C. Jarvis, 1820. Jefferson quotes on judicial despotism: University of Virginia, <https://bit.ly/3myYXqE>.

4 That may have something to do with Romney's Harvard Law School education. The Massachusetts Constitution was written by John Adams and served as a model for the federal Constitution. On why some Republicans or "conservatives" fall for the idea that the Supreme Court (federal or state) is the final arbiter, see Pat Buchanan (citing an essay by William Quirk), "The Supreme Court is not supreme," *TownHall.com*, July 6, 2003; <https://bit.ly/322FqFC>:

Conservatives and liberals fight like cats and dogs and disagree on almost everything," writes Quirk, "but, oddly, agree the Court should have the authoritative role the unwritten constitution provides for. They just disagree on who should control the Court." Why do conservatives and liberals agree that the court should decide such issues? Because both "share an abiding fear and distrust of American majority culture."

5 On public opinion at the time, see Robert Marus, "Massachusetts court legalizes gay marriage but stops short of issuing marriage licenses," *Associated Baptist Press*, Nov. 18, 2003; <https://bit.ly/2QcGQus>.

The survey on Americans' attitudes toward religion and homosexuality, taken by the Pew Forum on Religion and Public Life nearly a month before the Massachusetts decision, showed 59 percent of the respondents opposed gay marriage. But only 10 percent said they believe the Constitution should be amended to prohibit it, saying normal legislative means would be enough. See also Steve LeBlanc, "Changing constitution not easy in Massachusetts," *AP*, Dec. 2, 2006 (dead link). See historical detail in Ch. 5, Note 3.

6 Mitt Romney, *No Apology: The Case for American Greatness* (New York: St. Martin's Press, 2010), Kindle ed., Loc. 5,258 and 5,954.

7 Marc Ambinder, "Mitt Romney's Journey to the Right," *National Journal*, Feb. 9, 2007 (cover story, dead link: <https://web.archive.org/web/20070215042552/http://nationaljournal.com>). Blurbs asks: "Is Mitt Romney a traditionalist who blasts courts for opening marriage to same-sex couples or a moderate who applauded abortion rights?"

8 Jonathan Darman and Evan Thomas, "Governor Romney, Meet Governor Romney," *Newsweek*, Feb. 26, 2007; <https://bit.ly/31Z6oOz>.

9 Scott Helman and Scott S. Greenberger, "Some see conflict for Romney on gay marriage; Ceremonial licensing belies his opposition," *Boston Globe*, Jan. 2, 2006; <https://bit.ly/3uloPsc>.

See statute MGL Chapter 207, section 39, <https://bit.ly/3g7HMLw>.

Information on one-day designated wedding officiants is at "One Day Marriage Designation Instructions" (page from 2008, same as during Romney's tenure): <http://bit.ly/3e9rGQB>.

10 Mass.gov, "Massachusetts law about same-sex marriage" (as posted in 2022), <https://www.mass.gov/info-details/massachusetts-law-about-same-sex-marriage>. "The same laws and procedures that govern traditional marriage also apply to same-sex marriages. There are no special procedures for a same-sex marriage."

But the marriage statutes refer to a man marrying a woman, and vice versa – clearly thereby defining marriage as between opposite-sex persons. There is no mention of a man marrying a man, or a woman marrying a woman. MGL Ch. 207 Marriage, <https://malegislature.gov/Laws/GeneralLaws/PartII/TitleIII/Chapter207>.

11 The Court even confirmed this in its opinion two years later (in Dec. 2006), when it stated that the Legislature had a constitutional duty to vote on the VoteOnMarriage amendment, but *the Court could not force them to do so*. Jonathan Saltzman, "Vote on gay marriage is due but can't be forced, SJC says," *Boston Globe*, Dec. 28, 2006; <https://bit.ly/3t6lBlj>.

12 Focus on the Family, "Massachusetts Marriage Chaos; Gay Marriage a Reality in Massachusetts; No Opt-Out Clause for Justices of the Peace," *CitizenLink*, July 2004:

After being assured in February that the justices would be able file for conscientious-objector status, [a JP] was shocked to hear Winslow say they couldn't – and to hear an official from the state board of discrimination warn that trying to get out of officiating same-sex ceremonies could get them sued for \$25,000 to \$1 million.

Daniel Winslow emailed MassResistance to deny that conscientious objector status was ever offered by his office as originally stated in my timeline (as published November 2006), though he said the rest of my original timeline was correct. See email exchange below in this chapter.

13 "Romney's 'constitutional bungling' criticized; Leaders say he ordered 'homosexual marriage' even though court never asked him to," *WorldNetDaily*, July 12, 2007; <https://bit.ly/2OA09NY>.

14 Bob Unruh, "Experts: Credit Romney for homosexual marriage; 'What he did was exercise illegal legislative authority'," *WorldNetDaily*, July 14, 2007; <https://bit.ly/2QmaX2M>.

15 Constitution of the Commonwealth of Massachusetts; <https://malegislature.gov/Laws/Constitution>.

16 Gov. Mitt Romney, Statement on the *Goodridge* ruling, via *State House News*, Nov. 18, 2003; <https://bit.ly/3saAc5g>.

17 See section “Gov. Romney’s advisors” below in this chapter for detail on Winslow.

END OF Ch. 4 EXCERPT