



## Gay marriage spreads to New Jersey, with caution

By HARVEY SILVERGLATE | November 1, 2006

Following largely in the footsteps of the Massachusetts Supreme Judicial Court's landmark 2003 Goodridge decision, the New Jersey Supreme Court last week crafted its own legally and strategically brilliant decision that will extend equal-marriage rights to gay and lesbian residents of that state — but with a twist. While the Garden State court's decision resembles the legal reasoning in Goodridge, its decision steers clear of some of its predecessor's most contentious elements and thereby will likely shield itself from the worst public attacks. The New Jersey high court decreed that gay couples would enjoy spousal rights, but left it to the legislature, for now at least, to decide whether to label future unions as "marriage."

New Jersey's highest court took comfort in the august company in which it finds itself: "Today, only Connecticut and Vermont, through civil union, and Massachusetts, through marriage, extend to committed same-sex couples the full rights and benefits offered to married heterosexual couples," said the New Jersey court. Like our Supreme Judicial Court (SJC), the state's seven justices based their decision not on any federal constitutional claim, but on the text of the state constitution. Doing so insulates the decision from reversal by the US Supreme Court, which can review a state court's interpretations of its own constitution only if they conflict with federal law. Because no federal legislation or constitutional provision prohibits gay marriage, such judicial review in Washington is foreclosed.

The majority based its decision on the *equality* provision of New Jersey's constitution, taking another cue from the SJC, rather than on an expansion of the already-amorphous "liberty-interest doctrine," upon which the US Supreme Court based its 2003 *Lawrence* decision ruling that Texas's anti-sodomy laws were unconstitutional. It may seem like a technicality whether a court relies on "legal equality" or "liberty interest" analysis in a gay-marriage case. But from a legal and political perspective, the equality-under-the-law approach is much better grounded in legal doctrine and far more familiar to ordinary citizens.

The concept of “liberty interest” is found in the Fourteenth Amendment, which provides, “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” This has been interpreted by the Supremes as guaranteeing citizens a whole range of rights encompassed within the broad concept of “liberty,” such as the right to abortion (as in 1972’s *Roe v. Wade*) or to consensual homosexual sex, without intrusion by the state. Critics of the court have attacked this as judicial legislating, because it is a purely personal judgment whether, say, the right to terminate a pregnancy is part of what the Constitution considers “liberty.” In other words, the breadth of a “liberty interest” is, obviously, very subjective, which is its Achilles’s heel. Many state constitutions, including New Jersey’s, have a similar “liberty” provision, as well as a “legal equality” provision.

The New Jersey decision differs from the Bay State’s in one major respect. Rather than decree that marriage itself must be available to all, gay and straight alike, the New Jersey court sent the matter back to the legislature with instructions that it adopt legislation either to include gays within the current marriage statutes or to enact a “parallel statutory structure” guaranteeing the same rights and responsibilities as civil marriage. “Although courts can ensure equal treatment,” wrote the majority, “they cannot guarantee social acceptance.” Such acceptance will have to be debated by the people’s “popularly elected representatives,” concluded the court. Still, the New Jersey court reserved the ultimate right to review the legislature’s justification for any gay-union scheme that falls short of marriage. That bodes well for the future, since all seven justices voted for gay civil unions at the very least, while three favored going further and, following *Goodridge*, judicially decreeing gay marriage — period.

Here at “Freedom Watch,” we would have a hard time accepting legislation that stops short of calling gay unions “marriage,” even if all the same tangible benefits were granted (see “Name Game: The Inequality of Civil Union,” News and Features, December 12, 2003). The New Jersey court has left this final detail, at least for now, to the state legislature. Regardless, it’s still a stunning triumph for legal equality.