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The inequality of civil union

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"What's in a name?" Juliet asks in Shakespeare's *Romeo and Juliet*. "That which we call a rose by any other name would smell as sweet." Maybe, but if the rose is marriage, maybe not.

Last Friday, House Speaker Tom Finneran finally added his voice to the legislative debate on how to respond to the Supreme Judicial Court's groundbreaking ruling that gay and lesbian couples have the right to marry. As Finneran sees it, the 180-day delay before marriage licenses can be granted to lesbian and gay couples in the Commonwealth gives the legislature three options: *1)* to do nothing and allow the decision to stand; *2)* to pass an amendment to the state constitution specifically barring lesbian and gay couples from marrying; or *3)* to enact some form of civil-union legislation that would grant the benefits of marriage to same-sex couples.

This last option is what Governor Mitt Romney and Attorney General Tom Reilly want to do. And there is considerable support among legislators for such a bill. But this option would appear to have virtually no chance of passing muster with the SJC. The court was very clear that same-sex couples have a right to genuine marriage. Indeed, the SJC emphasized that gays are entitled not just to marriage's economic and legal protections, but also to its psychological and social benefits. Marriage is valuable to citizens for more than just "concrete reasons" such as economic benefits, the court noted. There is also an "intimately personal significance" to the institution. "The marriage ban," observed Chief Justice Margaret Marshall, "works a deep and scarring hardship on a very real segment of the community for no rational reason." The word "scarring" is of great significance, for it obviously connotes the *psychological* impact of the discrimination.

However, some legislative supporters of civil unions assure us that under such legislation, same-sex couples would enjoy *all* the attributes of different-sex marriage. Civil union thus would not be "marriage lite," as many supporters of full civil-marriage rights for same-sex couples derisively call it, but fully the same social arrangement enjoyed by hetero couples, only proceeding under a *different name*. So the question becomes whether the legislature can avoid extending to gay couples precisely the same rite extended to mixed-sex couples, by enacting a

civic rite that would mimic real marriage in every respect *except name*. Presumably there would be two types of certificates — one labeled "marriage" and the other "civil union," or some such verbal distinction.

But this set-up raises a legal question: if same-sex couples are subject to an arrangement that confers *every* attribute of straight marriage *except* the name "marriage," have such couples been deprived of the "equal protection of the laws" that, according to the SJC majority, requires the state to offer marriage to gays? To understand the problem, it is useful to analogize to other areas in which the courts saw fit to extend, to all citizens, legal rights previously denied to some on the basis of some legally irrelevant or improper characteristic or group-identity label. One has to ask whether this new form of "civil union" is more like real marriage than it is like "marriage lite." In short, one must ask whether merely naming the marriages of same-sex couples something other than "marriage" makes them sufficiently different, and hence inferior.

When the US Supreme Court addressed racial-segregation ("Jim Crow") laws during the 1950s, '60s, and '70s, it had to deal a fatal blow to the earlier doctrine of "separate but equal," established in the infamous 1896 case of *Plessy v. Ferguson*. In *Plessy*, the court upheld, 8-1, a Louisiana statute that required railroads to provide "equal but separate accommodations for the white and colored races," and barred passengers from occupying rail cars set aside for members of the other race. The court focused on the equality of the accommodations, ignoring the symbolic and psychological importance of the system of segregation. This doctrine had been the mainstay of segregation laws — the notion that as long as black citizens got the same services as white citizens, segregation did not deprive them of the "equal protection of the laws." This separate-but-equal doctrine was reversed, unanimously, in the landmark 1954 school-desegregation case of *Brown v. Board of Education*, where the court emphasized that no matter how equal black schools appeared to be to white schools, separate was inherently unequal simply by virtue of being separate. If nothing else, noted the court, separate inflicted psychological scar — just as the same-sex marriage ban inflicts a "scarring hardship" today.

Consider the perhaps simpler example of segregated water fountains, which were commonplace in public facilities throughout the Jim Crow South. "White" and "colored" fountains served the very same water, and neither fountain was inferior in quality or manufacture to the other. However, segregated water fountains are undoubtedly unconstitutional, because forcing blacks to use a "separate but equal" fountain pins on the black citizens what the courts call a "badge of inferiority." And one does not have to be a genius to understand that the separate fountains are meant to connote black inferiority and hence white superiority, rather than the reverse. Separate water fountains, like separate schools, are inherently unequal.

Similarly, the SJC made clear that gay couples are entitled to *real* marriage because of all the advantages, including psychological and social ones, conferred by the title. To call the marriage of a lesbian or gay couple anything other than "marriage" realistically must be seen as imposing a badge of inferiority. It is hardly apparent that the SJC would approve of this latest effort to give gay citizens *essentially*, or even *exactly*, the same (in terms of legal rights and obligations) marriage as is allowed to straight couples, but to call it by another name. Such a special category of union, simply because it is "separate" — even if otherwise seemingly "equal" — may not pass constitutional muster. In such a case, the SJC might take exception to Juliet's assertion that a rose by any other name smells as sweet.