



May 31, 2008

## Superceding events on gay marriage

That loud whoosh heard in Albany this week was the sound of history zooming past the state Senate, which is quickly moving from roadblock to afterthought in the battle over gay marriage in New York. The chamber's refusal to allow a vote on legislation legalizing such unions is being overrun by decisions of the judiciary and the executive branch.

On the day that Gov. David Paterson announced that New York, which does not permit its own same-sex couples to marry, would recognize such unions formed elsewhere, Senate Majority Leader Joseph Bruno complained of overreaching and hinted at legal action. The Republican leader opposes gay marriage and has refused to allow a vote on legislation legalizing same-sex unions, effectively leaving the chamber on the sidelines of history. Last year, by a 85-61 margin, the state Assembly voted to allow gays to marriage. Paterson, who fought against anti-gay and lesbian discrimination when he was in the Senate, has said he would sign a gay-marriage bill.

So only the Senate, where the Republicans enjoy a slim majority, has yet to weigh in - and it already is more than a day late.

## Executive action

Paterson's edict follows a California Supreme Court ruling earlier this month legalizing gay marriage, effective June 17. But the handwriting was on the wall much earlier. In 2004, then-Attorney General Eliot Spitzer, despite a stated personal support for gay-marriage rights, wrote a legal opinion that concluded that New York law made no provision for allowing same-sex marriage. But the Spitzer opinion also pointed to comity - the principle that New York respects the laws and judicial decisions of other jurisdictions. He wrote that same-sex marriages and civil unions lawfully entered into in other jurisdictions should be recognized here. The issue was especially relevant after the Massachusetts high court legalized gay marriage in 2003; it later limited that right as applied to non-residents.

Under New York law, Spitzer concluded, the "only exceptions to this rule (regarding recognition of out-of-state marriages) occur where recognition has been expressly prohibited by statute, or the union is abhorrent to New York's public policy." As the state's highest court would later observe, Spitzer found that New York had no expressed prohibition against gay-marriage, and the "abhorrent" exception had been construed narrowly, limited to marriages involving "polygamy or incest." Just the year before, a New York court recognized a Vermont "civil union" of same-sex partners in a wrongful death action in New York.

## A fresh case

Paterson received more legal authority earlier this month. On May 6, the state's highest court rejected an appeal of a Monroe County ruling that the community college there could not deny medical benefits to both members of a lesbian couple that that were married in Canada. The intermediate appellate court had noted that heterosexual marriages performed elsewhere

generally were recognized in New York. Not recognizing same-sex marriages done elsewhere, the court said, may violate the state's Human Rights law.

The state Supreme Court ruled initially that the couple were not entitled to benefits; that was overturned, 5-0, by the mid-level Appellate Division. A memorandum from the governor's office followed shortly thereafter. Not complying with the court's ruling, it stated, could subject the government to liability. The writing left a stalling Bruno and the Senate in history's dust.

A Journal News editorial

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