Massachusetts high court rules in favor of same-sex marriages

David Walsh
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The 4-3 ruling by Massachusetts' highest court on Tuesday striking down a state ban on same-sex marriages is the affirmation of an elementary democratic right. The Supreme Judicial Court held, in the words of Chief Justice Margaret H. Marshall, that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."

The court gave the state legislature 180 days to enact amendments to state law removing the restrictions on gay marriages. If the legislature does not act, the court could order the issuing of licenses to gay couples.

On legal and constitutional grounds, the Massachusetts high court decision is unassailable. The question before the court, wrote Justice Marshall, was whether the Commonwealth of Massachusetts, consistent with its own constitution, could deny the right of marriage to individuals of the same sex. Marshall and the three other justices in the majority concluded that it could not.

"The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens." The state, reasoned the court, "has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples."

The court rejected the state's claim that the primary purpose of marriage was procreation. It redefined civil marriage to mean "the voluntary union of two persons as spouses, to the exclusion of others." Marshall termed "civil marriage" a "civil right" and argued that "the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare."

The ruling argued that the recent US Supreme Court decision striking down anti-sodomy laws in Texas "affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner.... The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life."

Without specifically using the phrase, the court decision pointedly relied on the constitutionally-guaranteed separation of church and state. Indeed, the only consistent argument against same-sex unions is the religious one, i.e., that the specific male-female character of marriage has been divinely ordained and sanctified.

Marshall acknowledged that "deep-seated" religious and ethical convictions were held by proponents on both sides of the issue. "Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach." She commented in a later passage: "Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution.... No religious ceremony has ever been required to validate a Massachusetts marriage."

The ruling noted that considerable tangible benefits flow from the state of marriage, "touching on nearly aspect of life and death." It declared: "The department [of Public Health, the state agency responsible for issuing marriage licenses] states that 'hundreds of statutes' are related to marriage and to marital benefits."

One of the arguments advanced by state officials in support of the legal ban on same-sex marriages—and rejected by the court—was that bestowing the benefits of marriage on same-sex couples would cost the state scarce financial resources. The court ruled that withholding the right to marry would exclude individuals "from the full range of human experience" and deny them "full protection of the laws."

The high court made an analogy between forbidding same-sex couples to wed and previous legal bans on interracial marriage in the US. The court noted that the "long history [of bans on interracial marriage] availed not when the Supreme Court of California held in 1948 that a legislative prohibition against interracial marriage violated the due process and equality guarantees of the Fourteenth Amendment ... or when, nineteen years later, the United States Supreme Court also held that a statutory bar to interracial marriage violated the Fourteenth Amendment."

In the concluding section of her ruling, Marshall wrote, "The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason."

The right wing in the Republican Party, including President George W. Bush, reacted with predictable venom to the court's decision. Massachusetts Republican Governor Mitt Romney promised to introduce a state constitutional amendment to "preserve the institution" of marriage between a man and a woman. "I agree with 3,000 years of recorded history," Romney ignorantly declared.

Congressional Republicans chimed in along the same lines. Tom DeLay, the Texas Republican and House majority leader, denounced the Massachusetts court as part of a "runaway judiciary" and vowed that he and his fellow Republicans would introduce an amendment to the US Constitution banning gay marriage. Senate Majority Leader Bill Frist of Tennessee said he "absolutely" supported such a measure.

Bush would not openly endorse the idea, telling the press, "I don't know if it's necessary yet. Let's let the lawyers look at the full ramifications of the recent Supreme Court ruling." In a statement, however, he claimed, "Marriage is a sacred institution between a man and a woman. Today's decision of the Massachusetts Supreme Judicial Court violates this important principle. I will work with Congressional leaders and others to do what is legally necessary to defend the sanctity of marriage."

Leading Democratic Party presidential hopefuls responded with their usual spinelessness. Missouri Congressman Dick Gephardt issued a statement opposing gay marriage, but supporting gay unions; supporting the right of states to decide for themselves, but calling on the Massachusetts legislature to heed the court's decision. Most of all, he expressed the wish that the issue would go away. "As we move forward, it is my hope that we don't get side-tracked by the right wing into a debate over a phony constitutional amendment banning gay marriage," he declared.

Retired General Wesley Clark and Connecticut Senator Joseph Lieberman also refused to defend the court-backed right of homosexuals to marry, suggesting it was up to the state legislatures to decide. Lieberman, who voted (along with Gephardt) for the reactionary Defense of Marriage Act in 1996 that exempts states from honoring gay marriages from other states, reiterated his opposition to same-sex marriages. Massachusetts Senator John Kerry, who voted against the Defense of Marriage Act, also expressed opposition to gay marriage. Former Vermont Governor Howard Dean said he had been "proud to sign the nation's first law establishing civil unions for same-sex couples."

The extent to which the Democrats cower in fear of the ultra-right emerges in a November 19 *New York Times* article, which presents the defense of the elementary democratic right of same-sex marriage as a "thorny issue" in the 2004 elections. The article suggests that for the Democrats the provocative declarations from the Christian fundamentalist right "raise the unwelcome prospect that next year's presidential contest will be fought, at least in part, on the kind of cultural issues that have repeatedly put them at a disadvantage over the last 20 years.

"'This is going to be an issue next year because Bush wants to make it an issue,' said a senior aide to a Democratic candidate who spoke only on condition that his candidate not be identified. 'I have a feeling this is going to come up again and again.'"

The *Times* piece, which takes for granted that the American people share the outlook of Tom DeLay and fundamentalist zealots like Jerry Falwell and Pat Robertson, indulges in a bit of wishful thinking when it asserts that for Bush too the issue of gay marriage is "hardly an unambiguous gift." It repeats the conventional wisdom that his father, the elder George Bush, had become "too closely identified with conservative and religious leaders" and that this had cost him the 1992 election. The article is presumably meant to caution George W. Bush from making the same mistake.

Bush and his advisers show no such concerns. On the contrary, one of the Republican Party brain trust's principal strategies for the 2004 election is to fire up the party's fascistic "base" by placing opposition to gay marriage, along with other "cultural" issues such as opposition to abortion rights and support for school prayer, at the center of the campaign.

The claim by Bush that marriage between a man and a woman is a "sacred institution" and Senate Majority Leader Frist's assertion that it is "a sacrament" simply repeat the line of the Christian right. As Tony Perkins, president of the right-wing Family Research Council, puts it, "Marriage is the most fundamental institution of society. The law does not create it, it merely recognizes it." Marriage, in other words, was created by God.

While the Democrats have increasingly made the call for gay rights a vote-gathering tactic, their reaction to the Massachusetts court decision demonstrates that they have no serious commitment to the defense of democratic rights. The primary fear of the liberal establishment, expressed by Gephardt and the *Times*, is that the court's ruling will create a right-wing "backlash" and make life more difficult for the Democratic Party candidate in 2004. A forthright campaign to expose the right wing and fight social backwardness is inconceivable to these people.