California court decision legalizing gay marriage touches off political uproar

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The California Supreme Court refused June 4 to stay its decision issued last month declaring that gay couples had the same right to marry as heterosexuals. The action came two days after right-wing opponents of gay marriage successfully placed a constitutional amendment on the November general election ballot that would overturn the court decision.

The result is that gay marriage will become legal throughout the state on Monday, June 16 at 5pm, and then could potentially become illegal again on November 4 if the referendum wins voter approval. Current state opinion polls show narrow majorities for and against gay marriage, depending on how the question is worded.

The campaign to place the referendum on the ballot was financed by two ultra-right Republicans, billionaire Howard Ahmanson and Christian radio proprietor Edward Atsinger, as well as the fundamentalist Focus on the Family organization of Reverend James Dobson.

The diehard opposition of extreme right elements to gay marriage was demonstrated in Kern County (Bakersfield), in the San Joaquin Valley, where the county clerk announced that no marriages, gay or heterosexual, would be performed after June 13.

There were published projections of as many as 20,000 gay marriages during the June-November "window," including 5,000 in San Francisco alone. The language of the constitutional amendment—drafted before the court decision but anticipating it—does not appear to be retroactive, although constitutional law experts said there were no judicial precedents for the enforcement of a measure depriving people of democratic rights once gained.

In declining to delay implementation of its ruling, the California Supreme Court rejected pleas from the attorneys general of ten states—all Republicans—who sought a postponement until after the November 4 referendum vote. Because California provides marriage licenses without a residency requirement, these state officials argued there would be an influx of out-of-state gay couples who would marry in California and then return to their home states and file suit demanding recognition of their married status.

The ten states—Alaska, Colorado, Florida, Idaho, Michigan, Nebraska, New Hampshire, South Carolina, South Dakota and Utah—are among 44 that have some form of legal or constitutional prohibition of gay marriage, most enacted in the last five years at the instigation of Christian fundamentalist groups.

California state officials opposed any stay. State attorney general Jerry Brown, a Democrat, whose office argued vigorously in favor of the state ban on gay marriage that the court overturned, said the state Supreme Court decision had decided the issue. Governor Arnold Schwarzenegger, a Republican, also backed the state ban but said he would oppose the constitutional amendment to overturn the state court action.

In its May 15 opinion, the California court ruled by a 4-3 majority that "retaining the traditional definition of marriage and affording same-sex couples only a separate and differently named family relationship will, as a realistic matter, impose appreciable harm on same-sex couples and their children, because denying such couples access to the familiar and highly favored designation of marriage is likely to cast doubt on whether the official family relationship of same-sex couples enjoys dignity equal to that of opposite-sex couples."

The court refuted the notion that heterosexual couples would lose something essential and worthwhile if gay domestic partnerships were designated as marriage. "Extending access to the designation of marriage to same-sex couples will not deprive any opposite-sex couple or their children of any of the rights and benefits conferred by the marriage statutes, but simply will make the benefit of the marriage designation available to same-sex couples

and their children," the majority declared.

Two separate dissents accompanied the ruling. Neither opposed gay marriage as such, but argued that the decision to recognize such relationships legally should be decided on by the legislature or at the ballot box, not in court.

The history of the ruling dates back to February, 2004, when San Francisco city officials began issuing marriage licenses to same sex couples in protest of a ballot initiative from 2000 which defined marriage in California as between a man and a woman. At that time religious groups filed suits to stop the issuing of marriage licenses. The California Supreme Court held then that it was impermissible for the officials to issue marriage licenses without a judicial determination that the law in question was in fact unconstitutional.

In this most recent ruling the same court dealt with the substantive issues involved in the previous cases.

While the decision is the first by a state supreme court in an active controversy that requires absolute, to the point of terminological, recognition of same sex unions as marriages, it is not without precedent. In 2004 the Supreme Court of Massachusetts issued an advisory ruling to the state senate that the designation "civil union," even if defined as incorporating all of the rights accruing to spouses in a marriage, violated the state constitution's due process and equal protection clauses. (In 2003 that court had held that a ban on same sex marriage violated the Massachusetts state constitution).

The original ballot initiative that defined marriage as between a man and a woman was part of a broader effort by sections of the ruling elite to disorient sections of the middle class and working people and divert attention from real social grievances to largely manufactured "cultural" issues.

President Bush's 2004 election campaign employed the proposition of a constitutional ban on gay marriage to mobilize its fundamentalist base and to appeal to Americans as a president in touch with their "values." That year several states passed ballot initiatives defining marriage as between a man and a woman. By the 2006 mid-term elections, however, similar ballot initiatives did not prevent the Republicans from losing both houses of congress.

The reaction to the ruling from conservative organizations has been predictably hostile, even hysterical. Randy Thomasson, president of the Campaign for Children and Families, declared, "marriage is naturally for a man and a woman. If the institution of marriage is redefined and therefore destroyed in the law, the wellbeing of children is threatened, both emotionally, socially, even physically." He did not explain how, in a society where gay couples may already adopt children, it would "physically" harm the children to have their parents and caretakers legally recognized.

The right to marry and have that relationship legally sanctioned is an elementary democratic right. Under the current regime in most US states, gay couples are deprived of hundreds of benefits that heterosexual couples receive—one study in New York state found 1,324 separate provisions, ranging from hospital visitation rights to property rights and health insurance benefits.

It is noteworthy that six of the seven California Supreme Court justices were appointed by Republican governors. They divided 3-3, with the lone Democratic appointee breaking the tie. The decision thus is hardly the product of judicial radicalism.

Several justices on both sides of the ruling suggested that including gays would strengthen rather than weaken the institution of marriage, a step they argued would be beneficial for social stability as a whole. This position has been espoused as well by such conservative commentators such as Andrew Sullivan and David Brooks of the *New York Times*.

Sullivan argues for expanding the right to marriage because, "by setting up relationships that do the 'husbanding' work of family, such couples relieve the state of the job of caring for single people without family support."

Arguing along more explicitly moralistic grounds, Brooks has suggested that marriage, as the antidote to contemporary moral decline, should be made available to homosexuals. With so many marriages ending in divorce, so many unmarried couples cohabitating, and so many children being born out of wedlock, it is the state's duty to endorse marriage by gay couples willing to make "moral commitments, renewed every day through faithfulness, which 'domesticate' all people."