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First Blacks, Now Gays, Gain Rights

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The Massachusetts Supreme Judicial Court's momentous Tuesday ruling in Goodridge v. Department of Public Health makes more clear than any prior event in our history how American law's discriminatory treatment of gay people has imitated and duplicated America's earlier bigotry toward African-Americans.

Only in 1967, 13 years after Brown v. Board of Education voided racially segregated public schools, did the Supreme Court finally strike down anti-miscegenation criminal laws that prevented black and white people from marrying each other in the wonderfully named case of Loving v. Virginia. But Massachusetts Chief Justice Margaret Marshall's majority opinion in Goodridge repeatedly invokes not just Loving, but also a similar yet far less well-known decision, Perez v. Sharp, which the California Supreme Court rendered in 1948, six full years before Brown.

Perez struck down California's state ban on interracial marriages just as the Massachusetts court has now ruled that same-sex couples will soon be able to obtain marriage licenses there. By 1967, it was no longer controversial for the Supreme Court to hold that the prohibition of black-white matrimony inescapably represented a public declaration of the inherent human inferiority of African-Americans. Yet in 1948, when the California court voiced that same insight, a significant majority of American states still prohibited cross-racial unions.

Now Massachusetts' high court has expressed the same pioneering understanding as did California's. To those who assert that the history of marriage as an exclusively heterosexual institution is conclusive, Chief Justice Marshall gives the same answer that Earl Warren and his colleagues verbalized in Loving: "History must yield to a more fully developed understanding of the invidious quality of the discrimination" that the exclusion of gay people from marriage perpetrates.

Chief Justice Marshall's opinion notes "the wide range of public benefits reserved only for married couples." Perhaps most powerfully of all, her opinion cites the significant legal advantages that children of a married couple have over children from non-marital families. "It cannot be rational under our laws," she writes, "to penalize children by depriving them of state benefits because the state disapproves of their parents' sexual orientation."

The Massachusetts ruling persuasively rejects the state's three proffered defenses of its discriminatory law: encouraging procreation, fostering optimal child-rearing and conserving limited public funds. "Fertility is not a condition of marriage," the opinion notes; instead, "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." The court likewise found that neither of the state's two other grounds were rationally related to its exclusionary law.

Chief Justice Marshall suggested that Massachusetts' "marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexuals," just as anti-miscegenation laws were rooted in prejudice against people of color. Marshall's colleague Justice John Greaney made the same point more explicitly: "Neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families."

Especially persuasive was the court's answer to those opponents of same-sex marriage who claim that equalizing access to the right to marry somehow injures or insults heterosexual couples. Again, the racial parallel is powerful: "Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race."

Rather than ordering the immediate issuance of marriage licenses to the same-sex couples who are the Goodridge plaintiffs, the Massachusetts court deferred the effect of its ruling for 180 days in order to allow the state legislature to act in accordance with its ruling. Make no mistake, there is no possible constitutional channel by which the legislature, and / or Gov. Mitt Romney, can block or even delay the issuance of those licenses come next spring.

But there's another civil rights analogy that the court's 180-day deferral invokes, whether or not the justices realized or intended it. Look at a calendar, and count off 180 days from Nov. 18: the first same-sex marriage licenses in American history can be issued on May 17, 2004 - the 50th anniversary of Brown v. Board of Education. That's quite an appropriate coincidence, isn't it?

GRAPHIC: Illustration / David Gothard - Two men knocking down a wall with a gigantic gavel