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Democracy and same-sex marriage

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By Jeff Jacoby, Globe Columnist

MATT FOREMAN, the executive director of the National Gay and Lesbian Task Force, was celebrating Arizona's defeat of a proposed constitutional amendment defining marriage as the union of a man and a woman.

"It is always wrong to put basic rights up for a popular vote," he said, "and it is nearly impossible for any minority to protect itself when that happens. But today in Arizona the impossible happened."

Constitutional democracy is incompatible with the rights of minorities? That would have come as news to champions of American liberty from John Adams to Martin Luther King Jr. They would have been even more taken aback, to use no stronger term, by the suggestion that there is a "basic right" to homosexual marriage, something American law has never permitted.

Once, Americans who considered themselves progressive had faith in the collective wisdom of the citizenry and fought to extend the franchise to more people (e.g., women) and more decisions (e.g., the election of US senators). Their democratic confidence reflected a civic conviction as old as American independence itself -- that "governments are instituted among men, deriving their just powers from the consent of the governed."

But advocates of same-sex marriage appear to regard democracy as a snare to be avoided. Hence their preference for securing gay marriage by judicial command, as in Massachusetts and New Jersey. And hence their aversion to letting voters decide whether the definition of marriage should be changed.

"History is replete with examples of advances in civil rights that would not have been tolerated had they been put to a popular vote," wrote Kathleen O'Connor, president of the Women's Bar Association, about the petition by 170,000 Massachusetts voters for a constitutional amendment defining marriage. "If our Bill of Rights were today submitted for voter approval, it would be defeated as too radical."

Even more scornful of democracy was the Berkshire Eagle. "If civil rights were a matter for the ballot box," the largest newspaper in Western Massachusetts editorialized, "blacks would undoubtedly still be drinking from separate water coolers and riding in the back of buses." When the Massachusetts Legislature corruptly avoided voting on the petitioners' amendment, ducking the vote required by the state constitution, the newspaper cheered its lawlessness. "Civil rights should never be determined by a majority of voters," it declared. "Ballot questions are blunt instruments, lacking the delicacy of legislation."

It is hard to say which is sadder: the contempt for ordinary Americans that such comments reflect, or the ignorance of American history underlying them.

To begin with, it wasn't through "blunt" ballot measures that Southern buses and water fountains were segregated. It took the "delicacy of legislation" to write something so abominable into law.

Nor was it by means of a judicial bolt from the blue that segregation was finally crushed. It was through the passage of the Civil Rights Act of 1964 -- a legislative milestone that would never have been reached if not for the fact that a majority of white Americans supported it.

To be sure, there were court cases, such as *Brown v. Board of Education*, that played a role in extending civil rights to citizens of every race. But those rulings didn't conjure newfangled "rights" out of thin air. They restored rights that had been created democratically and were already supposed to be the law of the land. The 14th Amendment -- approved by Congress and ratified by three-fourths of the states in 1868 -- had guaranteed equality and due process to blacks and whites alike. The Civil Rights Act of 1875 had barred discrimination in public accommodations. But the Supreme Court had gutted those protections -- for example in 1896, when it authorized streetcar segregation in *Plessy v. Ferguson*. It wasn't democracy that failed black Americans during the long decades of Jim Crow. It was a judiciary unwilling to protect the equality that the democratic process had guaranteed.

The republican form of government to which all Americans are entitled makes them the source of the constitution(s) under which they live. The only valid civil rights are those that have the consent of the governed. Their legitimacy comes from the democratic process, not from judicial fiat or political correctness.

"I know no safe depository of the ultimate powers of the society but the people themselves," Thomas Jefferson said, "and if we think them not enlightened enough to exercise their control with wholesome discretion, the remedy is not to take it from them, but to inform their discretion." Same-sex marriage will never be a civil right until the people in their discretion make it one.