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California Rules!

A Defeat for Right-Wing Activism On and Off the Bench

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By Hans Johnson

Refusing to be boxed in by election-year timidity or political threats from the religious right, a majority of the California Supreme Court ruled May 15 that same-sex couples have an equal right to civil marriage in the state. The judgment stands on a sturdy foundation of precedents involving equal protection of the law. Its reasoning and force rebut a far-right charge that has cowed other courts despite being perfectly backward.

In a ruling that the state will not appeal, California's highest court ordered officials to begin granting marriage licenses to same-sex couples June 15. The clarity of the ruling is a reminder that people outside the ranks of a social movement can sometimes best articulate its progress.

"In contrast to earlier times," wrote Chief Justice Ronald George, "our state now recognizes that an individual's capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual's sexual orientation."

Sixty years ago, against a steep and contrary bent of public opinion, the same court upheld the right of a Mexican American woman, Andrea Perez, to marry her African-American sweetheart, Sylvester Davis, in Los Angeles. It took two decades for the U.S. Supreme Court to finally follow California's lead and nix all such bans on interracial marriages.

In the current marriage case, Carlos Moreno, the court's sole Latino justice, and two others joined the ruling by George, an appointee of former Republican governor Pete Wilson. George became the court's chief justice the very month (May 1996) that fellow Californian Anthony Kennedy, a Reagan appointee to the U.S. Supreme Court, confounded religious conservatives by striking down an antigay amendment to the Colorado constitution. The measure aimed to obliterate and forever outlaw any protection in any area of life against antigay bias, no matter how severe. Kennedy countered with simple declarative grace that even a majority of voters cannot make gay people "strangers to the law."

Seven years later, in 2003, Kennedy infuriated the far right again with his ruling against a Texas sodomy statute so prone to abuse that police could wield it to barge into homes and bedrooms and arrest unsuspecting adults. Today, at its fifth anniversary, the Lawrence standard nullifying all state sodomy laws and extending privacy continues to gain traction in politics and case law in part because of its author's conservative credentials.

Even the farthest right-wing fringe refrains from demonizing Kennedy due to his status as a swing vote on the Supreme Court. Instead, like prison wardens mocked by defiance of a noncompliant inmate, they direct their rage at justice David Souter, the moderate appointee of Bush 41, and the aged but unflagging jurist John Paul Stevens, a Ford appointee whose demise some on the right actually pray for.

George, in California, like Kennedy before him, held forth with a boldness informed by such extremism and determined to limit its tyranny. Similar to Kennedy, he struck down the specific

provisions before him in a holding that transcends discrimination in the marriage cases. He wrote: “An individual’s sexual orientation — like a person’s race or gender — does not constitute a legitimate basis upon which to deny or withhold legal rights.”

The court applied an age-old insight to efforts by antigay leaders to infringe on the rights and freedoms of a minority group through a referendum, like the one restricting marriage rights approved by California voters in March 2000. Hostility and hype aimed at barring a group of people from accessing a right they seek recalls a line from Shakespeare: You really do protest too much, the court, in essence, ruled.

But seek marriage gay couples have. “We waited more than 50 years for the opportunity to marry,” said Phyllis Lyon, 83, a San Franciscan who, along with her partner of 56 years, was a plaintiff in the California case. “We are thrilled this day has finally come.”

Attentive to the human stakes of the case, the majority spurned calls for caution or dereliction of duty that have diverted other courts. The only other state high court to weigh in favorably on equal marriage rights for same-sex couples is Massachusetts’. In the wake of that ruling, in November 2003, right-wing strategists intent on using the issue as an electoral wedge honed the charge of “judicial activism.” Taking up gay-rights cases and this accusation like a weapon, they have hijacked legislative debate and hoodwinked the press. The rhetorical ploy has even worked in jurisprudence, in how judges speak to themselves.

In Washington state in 2006, for instance, Supreme Court Justice James Johnson did not content himself with his kingmaking role in a 5-to-4 vote rejecting equal-marriage claims of same-sex plaintiffs. He added insult to injury, lecturing his dissenting peers: “Where courts attempt to mandate novel changes in public policy through judicial decree, they erode the protections of our constitutions and frustrate the constitutional balance, which expressly includes the will of the people who must ratify constitutional amendments.” He damned “judges’ subjective feelings” in favor of their supposedly “objective consideration of historical understanding.”

Both balance and a sense of history mean little to the right wing. For the past five years, the charge of judicial activism has become an unexamined codeword for incongruity with their ideology. “The truth,” wrote Paul Waldman recently in *The American Prospect*, “is that an ‘activist judge’ is a judge who makes a decision conservatives don’t like.” Reporters, lawmakers, candidates for office, and professors of law and policy have an obligation to call out the strategy for mislabeling judges as captives of partisan marching orders.

Waldman marshals three separate studies, one by Thomas Miles and Cass Sunstein of the University of Chicago, to show that so-called conservatives on the bench are the ones remaking the law in the heat of their zeal and the dim light of ideology. Real judicial activism—or the willingness to maintain partisan lockstep in rejecting precedents, lower-court holdings, or agency decisions—is most pronounced among right-leaning judges themselves. On the Supreme Court, Scalia and Thomas are the worst offenders.

For the past eight years, through two additions to the Supreme Court and a drive to end the filibuster, this phrase has been the right wing’s smoke and mirror. It hides the inhumane priorities of and disguises conflicts among the ideologues who deploy it. Yet it still reflects back on them, like a case of psychological projection.

In contrast to the duplicity and distortion that has afflicted judicial politicking in the Bush era, the California ruling gives rise to a new rallying cry: judicial counter-extremism. That philosophy links the public, legislators, the president, and judicial appointees in a coherent theme for governance aimed at overcoming bias.

The unifying goal of counter-extremism is strikingly consistent with the philosophy of Barack Obama. His appeals for votes and primary victories highlight the key role he sees for fair-minded

Republicans and independents in his Democratic coalition. Selected appointees with progressive values and GOP pedigrees would throw a wrench in the attack machines of the right wing. On the marriage case in particular, he “respects the decision of the California Supreme Court” and “opposes all discriminatory constitutional amendments, state or federal.”

The staying power of the new California ruling hinges on the fall. A referendum to undo it by amending the state constitution to outlaw same-sex marriages may appear on the Nov. 4 ballot. Whether more Americans than those in California and Massachusetts get a taste for real equality may be riding on who names the next cast of federal judges. They will referee the coming conflicts between equal protection, unequal treatment, and the Defense of Marriage Act inherited from the Clinton years.

Taking up the theme of judicial counter-extremism might turn the tables on the right wing’s tired refrain of judicial activism and give Obama mileage. By revealing the stark choice between him and an extremist-hugging McCain on the issue of judicial appointments, it might help Obama turn the tide.

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