DOES PROP 8 DECISION PROVE CALIFORNIA SUPREME COURT LOST ITS WAY?

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It's been a while since I've mouthed off about same-sex marriage in California. Joanne and I even got married since (in July), as did 17,999 other same-sex couples after the state's Supreme Court in May made gay marriage legal, but before the prohibitive Proposition 8 went into effect on Nov. 5th. I'm back to the subject, however, because that same Supreme Court's ruling this week actually blew my mind.

After declaring last year that gays and lesbians are a protected ("suspect") class who could not be denied the right to marry, we are now told that we can be denied that right because the majority of voters who voted in November didn't think we were entitled to that "fundamental" (as the court put it last year) right. Even the word "married" was hitherto important to Chief Justice Ronald George and having to call ourselves "domestic partners" just wasn't as good, let alone fair. However, this week, again writing for the 6 – 1 majority, he rationalized that it was okay for20us to be called "domestic partners". We carve out, as Chief Justice George put it, "a limited exception (Note, now he calls it "limited"!) by reserving the official designation of the term "marriage" for the union of opposite-sex couples but leaving undisturbed all of the other aspects of a same-sex couple's constitutional rights to establish an officially recognized and protected family relationship and to the equal protection of the laws."

WHAT!!! Does that make any sense, especially when held up against the very same court's previous ruling? Absolutely not. Not only that, but all the chatter about "amendment" vs. "revision" could have made most people totally confused. An amendment is okay for the people to vote up or down but a revision, which the majority stated means a "wholesale or fundamental alteration of the constitutional structure that appropriately could be undertaken only by a constitutional convention". Which was it? Justice Moreno in his lonely dissent was clear: "Requiring discrimination against a minority group on the basis of a suspect classification (which the court held applies to gays and lesbians last year) strikes at the core of the promise of equality that underlies our California Constitution and thus 'represents such a drastic and far-reaching change in the nature and operation of our governmental structure that it must be considered a "revision" of the s tate Constitution rather than a mere "amendment" thereof.' "

Honestly, the amendment/revision debate, though unfortunately the only way to challenge Prop 8 (in state court) seemed like an analysis of how many angels really do a jig on the top of a pin. It wasn't THE issue; it was about trying to find a way to get at the issue and the way just wasn't there. It was a thicket in a dense forest of crappy old trees that is the California initiative system. It just doesn't work for the state that is the world's 5th largest economy -- and has a whole huge bunch of citizens trying to live side by side in it -- to allow the voters to make the laws. Direct democracy doesn't work, we learned in grade school; that's the reason we have a federal system of government, the reason we have courts and a legislative branch.

I was so disturbed by how out of sync the whole thing felt that I told Joanne I couldn't bring myself to protest the decision. This was never a street kind of thing to me. It was never

something that we should have allowed to be decided by the voters, most of whom are, to put it kindly, not very well-informed, particularly about constitutional rights. I'd been talking about going to federal court. I'd been saying that our 14th amendment rights to equal protection and due process were being trampled.

As I was on my way back from the=2 0dentist today, having been told I need root canal work (so not in the greatest of moods), I called Joanne, who joyously announced to me that Ted Olsen (the Republican lawyer who argued for Bush in Bush v. Gore) and David Boies (the Democratic lawyer who argued for Gore in Bush v. Gore) had teamed up and were asking the federal district court to require California to continue allowing same-sex marriages until the federal courts (read: U.S. Supreme Court) can rule on this issue. The two uber-lawyers have apparently been plotting this ever since Prop. 8 made it onto the ballot. Finding two same-sex couples (male and female) willing to put off marrying so they could have standing to sue now, they've decided even they have had enough of the hash being made of the federal constitutional rights, including not just equality but due process, liberty and just about everything else.

It's too bad that it takes two big straight guys, great lawyers both, to have the guts and resources to do this. The various marriage rights groups in California have been emailing and calling and writing and screaming that we'll "show them" how the real majority of voters here in California feel come the 2010 election. The trouble with this is that it doesn't matter what the voters think. It shouldn't matter. Have we forgotten what the majority has done to tyrannize any given minority throughout history? This is a matter that must be decided by people (read: judges) whose duty it is to interpret the constitution and ensure that we're all treated fairly. The California Supreme Court lost its way, all but one of them apparently scared by the threats from the right that there would be a campaign mounted to vote them off the bench, the way Rose Bird was when, in her day as Chief Justice, she openly opposed the death penalty and refused to have it enforced. My mother always used to talk about having the courage of your convictions. Justice Bird did; Justice George and company don't. We should follow my mother's – and Rose Bird's – advice.

Thanks to the muddled, illogical decision of the California Supreme Court, here we are again – some of us on the streets, venting our anger; some raising money for another ballot initiative in 2010 and some of us very happy that we are finally in federal court on this issue, exactly where I feel we belong. It was appropriate to outlaw separate but unequal drinking fountains in the south during segregation. Surely, today, our federal courts can see their way to outlaw separate but unequal "unions" between people.

Finally, I feel like this issue is where it ought to be: on the way to the 9th circuit that covers California, one that is thought to be one of the most liberal courts of appeal in the federal judiciary. After winning there, which I'm pretty sure we will, we can look forward to the case getting to the U.S. Supreme Court, which I think will actually take it. Even though they hate jumping into issues before they have to, this particular matter has made a circus out of the American justice system – with Iowa and a few liberal northeastern states leading the way on same-sex marriage, while all the rest either ignore or deny it.