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CALIFORNIA BANS GAY MARRIAGE BY SIMPLE MAJORITY VOTE

by CLAY REHRIG

2008 was a bittersweet year for the gay rights movement. The Supreme Court of Connecticut granted same-sex couples the right to marry.¹ *Milk*, the blockbuster movie about a slain gay politician from San Francisco, generated immense media attention and was nominated for an Academy Award for Best Picture.² Most notably though, the Supreme Court of California extended the fundamental right to marry to same-sex couples, only to have this right trumped by a ballot initiative a few months later.³ Proposition 8, California's constitutional amendment to ban same-sex marriage, was approved by the voters of California on November 4 with 52 percent of the vote.⁴

A FUNDAMENTAL RIGHT RECOGNIZED

In 2004, Gavin Newsome, the mayor of San Francisco, spurred the same-sex marriage battle when he began offering marriage licenses to same-sex couples on the steps of San Francisco's City Hall.⁵ Subsequently, the Supreme Court of California intervened and ordered the city to stop issuing marriage licenses to same-sex couples based on a 2000 California law, which restricted marriage to a union between one man and one woman.⁶ However, the validity of this law and the court's order to halt the gay marriages prompted six same-sex couples in California to file a law suit in the Supreme Court of California alleging discrimination on the basis of sexual orientation.⁷

On May 15, 2008, these six couples finally received the recognition they were seeking. In a 4-3 ruling, the California Supreme Court struck down the state's distinction between civil unions and marriages and ruled that homosexual couples must be afforded the same right to marry already granted to heterosexual couples.⁸ Further, it found that, in terms of judicial review, sexual orientation is a suspect classification similar to race or sex and now strict judicial scrutiny must be used when rights are denied based on sexual orientation.⁹ Conservative and religious-affiliated groups denounced the decision, and in response, collected enough signatures to place a constitutional amendment on the ballot in the next election.¹⁰ The result was Proposition 8, which unequivocally prohibited a same-sex couple from marrying under the Constitution of California.

. . . AND TAKEN AWAY

The battle over Proposition 8 was long and wrought with emotional entanglements. Both supporters and opponents fought tough battles and endured the other side's blatant offensives. Proponents complained about the constant barrage of names like "bigot" and "homophobe," while opponents worried about the religious condemnation paraded by the other side.¹¹ Furthermore, it was expensive. More than \$70 million was raised for and against the measure, totaling more than all similar campaigns combined.¹² In the end, the amendment passed, banning same-sex marriages in the country's largest state and putting the validity of over 18,000 same-sex couples' marriages in jeopardy.¹³

Proponents of the ban view it as a legal means of protecting one of the basic components of our society. Ed Vitagliano of the American Family Association calls Proposition 8 “an important short-term measure” in the drive to maintain traditional marriage.¹⁴ He explains that no matter what courts rule, two men cannot marry, but these court rulings have a profound effect on the views of people all over the country.¹⁵ For this reason, Vitagliano sees it as important for the people to stand up, reassert their own values, and not let society be dictated by judicial whim.¹⁶

Among those whose marriage is now uncertain is Todd Young, a Chicago native, who traveled to California to marry his long time partner on August 1, 2008. He recalled feeling “disbelief” when he woke up to the results the morning after the election.¹⁷ Now, with the legal status of his marriage undecided, Young says this issue has become “a very emotional one.”¹⁸ Young explains that over the years, as a member of the gay community, he had come to accept his place in society as a second-class citizen. But for Young, the opportunity to marry finally provided a sense of equality with the rest of society, only to have it undermined by the emotional outcome of Proposition 8.¹⁹

Although devastating for Young and the 18,000 other recently married couples, Jim Madigan, attorney and gay rights activist with Equality Illinois, explains that Proposition 8 is not a complete overruling of the rights recognized for gay couples. In fact, its effect is rather narrow because it only takes away the right to marry.²⁰ Homosexuals remain a protected class, which was the real bite of the Supreme Court’s judgment.²¹ Because the Court defined homosexuals as an oppressed group, additional legislation based on sexual orientation must now pass heightened judicial scrutiny, and this part of the Court’s judgment will stand.²²

The Supreme Court of California has agreed to hear a case challenging the validity of Proposition 8 and the legal status of the 18,000 same-sex couples who were married in California during the five months gay marriage was legal. If Proposition 8 is upheld, it will reinforce the idea that the people of California can change their constitution by a simple majority vote, ensuring the marriage ban will remain in place only until the voters decide to overturn it through a similar ballot initiative in the future.

A MINORITY SUBJECTED TO THE WILL OF THE MAJORITY

The people of California voted and rejected gay marriage. Now the debate has evolved into what happens when the majority elects to strip a minority group of a recognized fundamental right. Gay activists have dubbed this fight “the civil rights struggle of our generation.”²³ Ironically, in the same election where the first African-American was elected President, black voters overwhelming supported the ban on a minority group’s rights.²⁴ The silver lining, though, is the Civil Rights Act of 1964, and the present activists’ persistence that equal rights are not a matter of *if* but *when*.²⁵ Similar to how the Civil Rights Act elevated the status of all African-Americans and ended discrimination based on race, the gay movement hopes that something similar will be implemented regarding one’s right to marry regardless of sexual orientation. As one Illinois legislator explains, “the tendency to do what is right over what is wrong, and to expand individual’s rights rather than taking them away, always wins out in the end.”²⁶ Sooner or later rights for gays and lesbians will be recognized, just like they were for the black community. And similar to what happened in 1964, progressive legislation should come first to protect a minority’s rights; voters’ hearts and minds will follow.

Young believes that although his legal status might revert back from “married” to “single,” he is emotionally no less married.²⁷ He will continue to fight for gay marriage, stating that “we have to claim this right so others can claim it more easily.”²⁸ In response to Young and to those 18,000 same-sex couples, Vitagliano says, “they simply aren’t married.”²⁹ He explains that “marriage can only be between one man and one woman,” and for him, this traditional view of marriage is important to defend, even if it means another constitutional amendment.³⁰

Galvanized by the passage of Proposition 8, the gay movement vows to continue this fight.

NOTES

1 *Showdown; Proposition 8*, ECONOMIST, Nov. 1, 2008, http://www.economist.com/world/unitedstates/displayStory.cfm?story_id=12522924.

- 2 *Complete List of Academy Award Winners and Nominees*, CNN.COM, Feb. 23, 2009, <http://www.cnn.com/2009/SHOWBIZ/Movies/02/22/oscar.nominees.full.list/index.html>.
- 3 Jessica Garrison, *Voters Approve Proposition 8 Banning Same-sex Marriages*, L.A. TIMES, Nov. 5, 2008, <http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story>.
- 4 *Id.*
- 5 *Mayor Defends Same-sex Marriages*, CNN.COM, Feb. 22, 2004, <http://www.cnn.com/2004/LAW/02/22/same.sex/index.html>.
- 6 John Ritter, *California Court Stops Gay Marriages*, USA TODAY, Mar. 11, 2004, http://www.usatoday.com/news/nation/2004-03-11-gay-marriage-calif_x.htm.
- 7 *Id.*
- 8 *In re Marriage Cases*, 183 P.3d 384 (Sup. Ct. 2008).
- 9 Interview with Jim Madigan, Interim Executive Director, Equality Illinois, in Chicago, Ill. (Mar. 9, 2009).
- 10 Maura Dolan, *California Supreme Court Overturns Gay Marriage Ban*, LA TIMES, May 16, 2008, <http://www.latimes.com/news/local/la-me-gaymarriage16-2008may16,0,6182317.story>.
- 11 Joe Mozingo, *Proposition 8 Supporters Vent Frustration over Continued Protests*, LA TIMES, Nov. 11, 2008, <http://www.latimes.com/news/local/la-me-prop811-2008nov11,0,5752091.story>.
- 12 *Showdown; Proposition 8*, *supra* note 1.
- 13 Jessica Garrison, *supra* note 3.
- 14 Telephone Interview with Ed Vitagliano, Director of Research, American Family Assoc. (Feb. 6, 2009).
- 15 *Id.*
- 16 *Id.*
- 17 Interview with Todd Young in Chicago, Ill. (Feb. 11, 2009).
- 18 *Id.*
- 19 *Id.*
- 20 Interview with Jim Madigan, *supra* note 9.
- 21 *Id.*
- 22 *Id.*
- 23 Deb Della Piana, *The Greatest Civil Rights Battle of Our Generation*, OPEDNEWS.COM, Nov. 26, 2008, <http://www.opednews.com/articles/The-greatest-civil-rights-by-Deb-Della-Piana-081124-884.html>.
- 24 CNN.com, Exit Polls, Ballot Measures, <http://www.cnn.com/ELECTION/2008/results/polls/#val=CAI01p1> (last visited Apr. 3, 2009).
- 25 Interview with Jim Madigan, *supra* note 9.
- 26 Interview with Greg Harris, Illinois State Representative, in Chicago, Ill. (Mar. 27, 2009).
- 27 Interview with Todd Young, *supra* note 17.
- 28 *Id.*
- 29 Interview with Ed Vitagliano, *supra* note 14.
- 30 *Id.*