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Magisterial Conviction

Why the California Supreme Court did more than legalize gay marriage.

By Kenji Yoshino
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On Thursday, by a 4-3 vote of the state Supreme Court, California followed Massachusetts and became the second state in which same-sex couples can tie the knot as tightly as straight couples can. The Massachusetts opinion of 2003 will always have the fame of a first mover. In it, the state high court found that the exclusion of gays from marriage deprived them of both liberty and equality rights protected under the state constitution. The California Supreme Court came to the same conclusion, but in terms that have more legal bite and greater political consequence.

The legal difference between the two opinions lies in the so-called "rational basis" review used by the Massachusetts court and the "strict scrutiny" deployed by the California Court. In constitutional parlance, these terms describe how closely a court will examine state legislation: will it give the legislature the benefit of the doubt, or not? Rational basis review is so lenient that it almost always results in the validation of state policies (in this sense, the 2003 Massachusetts ruling was an aberration), while strict scrutiny is so stringent that it almost always results in the invalidation of such policies. In other words, the standards supposedly only express how closely the court will look at laws, but looks can kill.

Writing for the California high court, Chief Justice Ronald M. George first found that the exclusion of gays from marriage violated their fundamental right to marry, thereby drawing strict scrutiny from the court. This meant that the state would have to produce a compelling reason to bar gays from what the court deemed "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." In a crucial move, Chief Justice George rejected the state's argument that tradition was such a reason. Allowing tradition to thus entrench itself, he said, would have allowed for laws barring interracial couples. And, as he noted, the California Supreme Court struck down a ban on interracial marriage in 1948, almost two decades before the U.S. Supreme Court did in *Loving v. Virginia*.

Although he could have decided the case on this basis alone, the Chief Justice kept going. He explicitly found that discrimination against gays, on the basis of their sexual orientation, was equivalent under the California state constitution to discrimination against racial minorities. To my knowledge, California's is the only state high court to have come to this conclusion (the federal Supreme Court has not weighed in). For gays, this pronouncement is critical because it is portable—that is, gays can now challenge any California state policy that discriminates on the basis of sexual orientation. As Marty Lederman points out elsewhere in ***Slate***, this in its own right is a signal advance for gay people.

The magisterial conviction of Thursday's opinion would be extraordinary no matter what court had delivered it. But its issuance from the high court of California is nothing short of revolutionary. Recent polls show that the California Supreme Court is the most respected state high court in the country. This suggests that other courts may borrow its strict scrutiny standard, under which most bans on same-sex marriage would fall. Even if no other court adopts today's reasoning, the mere fact that millions can marry in the Golden State will have its own effects. California is the most populous state in the nation and one of the top 10 economies in the world (alongside nations like Canada and Italy). Because of its cultural, political, and economic influence, what happens in California does not stay in California.

So much depends, then, on the inevitable legislative response to this opinion. The refusal of the opinion to temporize or compromise will make it a political lightning rod. An initiative to pass a state constitutional amendment banning same-sex marriage has already been proposed for California's November 2008 ballot. Unlike the anti-gay marriage initiative that failed in Arizona in April, the upcoming one in California takes narrow aim at marriage itself, leaving domestic partnerships alone. If that initiative succeeds, Thursday's court opinion will be wiped off the books. If it fails, opponents of same-sex marriage will no longer be able to say that activist judges have imposed their mores on an unwilling Californian public.

It is helpful for the California opinion that it closely resembles a U.S. Supreme Court decision that has stood the test of time: *Loving v. Virginia*. In that 1967 ruling, the court struck down all remaining state bans on interracial marriage under the federal constitution. Like Thursday's decision in California, *Loving* made the same dual move of invalidating legislation, based on strict scrutiny, on grounds of both liberty and equality. This move is unusual—indeed, I know of no case other than *Loving* and Thursday's case that has made it.

On the 40th anniversary of her victory, African-American plaintiff Mildred Loving last year issued a statement urging that gays be allowed to marry. Her support must have been welcome to the same-sex couples who had been patiently waiting for the chance to do so. Del Martin, 87, and Phyllis Lyons, 83, are lesbian activists who have been in a committed relationship for 55 years. They got married in San Francisco in 2004, during the brief window in which Mayor Gavin Newsom unilaterally declared that they could have a

legal wedding. But the courts told Newsom he did not have that power, and their marriage was later annulled.

Mildred Loving died 13 days ago, so she did not get to see the California court take up her cause. Martin and Lyons, who were mentioned in Thursday's decision, are still among us and can marry again. One hopes that when Californians vote on the ballot measure this fall, they will be mindful of those who never lived to see today's opinion—and of those who never thought they would.

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