

iMAPP Research Brief

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NEWSPAPER REACTIONS TO CALIFORNIA *MARRIAGE CASES*

By Joshua K. Baker

On May 15th, the California Supreme Court struck down Proposition 22, passed by 61 percent of California voters in 2000, and issued a ruling that civil unions were not sufficient.

How have Americans responded? We looked at one potentially influential indicator—editorials in major newspapers across the country—and find a surprisingly ambivalent response.

Of the 20 highest-circulation newspapers in the U.S.,¹ 12 published editorials about the California ruling.

Of these 12 newspapers, 7 opposed the ruling, 4 favored it and 1 expressed both favorable and opposing views while focusing on the Florida marriage amendment.

Given that major newspapers are located in metropolitan areas and are historically liberal, this response is striking.

The major fear voiced by newspapers opposing the ruling is that the undemocratic imposition of same-sex marriage will spark a “culture war” similar to that sparked by *Roe v. Wade*’s overturning of abortion laws, and that the gay rights movement would be better served by trusting the democratic process and the rapid change in opinions among their fellow citizens.

¹ Circulation data is taken from the Audit Bureau of Circulations FAS-FAX data and is current as of March 31, 2008. See “Top 25 Daily Newspapers in Latest FAS-FAX,” Editor & Publisher, April 28, 2008, available at http://www.editorandpublisher.com/eandp/search/article_display.jsp?vnu_content_id=100379510 9 (last visited June 4, 2008).

EXCERPTS FROM NEWSPAPERS OPPOSING THE CALIFORNIA MARRIAGE RULING

1. **USA TODAY (circ. 2,284,219),** Editorial, “California ruling invites backlash against gay rights -- Civil unions, the best solution, are jeopardized by court decision,” May 22, 2008.

<http://blogs.usatoday.com/oped/2008/05/our-view-on-sam.html#more>

“But the unfortunate and unnecessary impact of the California Supreme Court ruling might well have been to set back the cause of gay rights more broadly. . . . In other words, pragmatic political compromise on the intensely controversial issue is not allowed in California. It’s all or nothing, and recent political history leaves little doubt about what will follow. . . .”

“[T]he domestic partnership laws in California are hardly equivalent to the egregious racial discrimination of the Jim Crow era. Far from denying rights, they guarantee gays equal treatment in such important areas as raising children, assigning responsibility for medical choices and settling financial matters.”

2. **THE WALL STREET JOURNAL, (circ. 2,069,463)** Editorial, “Gay Marriage Returns,” May 16, 2008, at A12.

<http://online.wsj.com/article/SB121089440635197017.html>

“Judges invent wedge issues. Always have. As with California’s Supreme Court, many of the berobed judiciary take it as their solemn duty to do the people’s thinking for them on the modern world’s most difficult and divisive social issues. So it was with *Roe v. Wade*, when the U.S. Supreme Court declared 50 state legislatures irrelevant. The aftermath has been more than 30 years of the abortion wars.

“California’s Supreme Court is not the law of the land, but its 4-3 ruling, titled “In re Marriage Cases” for six consolidated appeals, explicitly told both the state’s voters and its elected legislature to get lost.”

3. **NEW YORK POST (circ. 702,488)**, Editorial, “Overreach on the Left Coast,” May 17, 2008.

http://www.nypost.com/seven/05172008/postopinion/editorials/overreach_on_the_left_coast_111272.htm

“Gay activists understandably are elated at the California Supreme Court’s historic decision legalizing same-sex marriage in that state. But the ruling was yet another unwise exercise in judicial activism: judges imposing their personal vision of a proper social order on an unwilling electorate.”

4. **THE WASHINGTON POST, (circ. 673,180)** Editorial, “Meddling in Gay Marriage: California’s Supreme Court intrudes into a social issue that the state’s political process was handling well,” May 20, 2008, at A12.

“There have been times in this country’s history when judicial action was necessary to overcome entrenched injustice. The U.S. Supreme Court acted properly and well within judicial bounds when it ruled that the policy of ‘separate but equal’ educational facilities for

white and black students offended the Constitution. By 1954, when the court decided *Brown v. Board of Education*, it was abundantly clear that the separate-but-equal approach was an abysmal failure that produced nothing remotely approximating equal facilities, resources or opportunities for black students. The court was justified in striking down the policy as a clear violation of the 14th Amendment, which was, after all, enacted after the Civil War to prevent exactly this type of substantive discrimination.

“This is a far cry from the California experience with the rights of same-sex couples. . . . The only thing they lacked was the right to be called “married.” This, a slim majority of the California court ruled, was unacceptable, insinuating that the real, remarkable and well-deserved gains won by gay couples through the political process were entirely inadequate. They then engaged in an unnecessary bout of judicial micromanagement by redefining marriage through a novel reading of the state constitution.”

5. **CHICAGO TRIBUNE (circ. 541,663)**, Editorial, “Democracy and Marriage,” May 18, 2008.

http://www.chicagotribune.com/news/opinion/editorials/chi-0518edit2may18_0,5791599.story

“In 1973, abortion rights advocates thought the issue was permanently resolved in their favor when the Supreme Court established a constitutional right to abortion. But the verdict galvanized a fervent anti-abortion movement, which has battled ceaselessly, and with some success, to curb this freedom. . . . The experience shows that the soundest basis for a new right is the democratic process, not judicial decree.

“The nation may be about to get a refresher in that lesson. Thursday, the California Supreme Court said the state must allow same-sex marriage, a decision that was unsound in its reasoning and most likely counterproductive in its political impact. . . .”

“But all individuals do have the right to marry as the word has always been understood—as a union of a man and a woman. The comparison to interracial marriage is common but inaccurate. The argument made by white supremacists against miscegenation was not that it violated the basic understanding of marriage, but that it violated the segregationist understanding of permissible race relations, which forbade sexual contact between blacks and whites. The argument against gay marriage, by contrast, is that it drastically redefines a vital institution.”

6. THE DALLAS MORNING NEWS, (circ. 368,313)

Editorial, “Gay Marriage Not Going Away,” May 21, 2008.

http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/DN-gaymarriage_21edi.ART.State.Edition1.460ecb6.html

“If this reasoning prevails in other courts, civil unions – a popular compromise between the status quo and full marriage rights – won’t stand. The California court action forces Americans to take a stand on either side of the divide. . . . By leaping ahead of evolving social mores and removing the issue from democratic debate, the courts could be inadvertently setting up a backlash that threatens to poison our politics for some time. The United States was headed toward widespread acceptance of legalized abortion when the U.S. Supreme Court’s 1973 Roe vs. Wade decision gave birth to the pro-life

movement, and more than three decades of intense polarization of national politics.

“Under the California court’s logic, the only way to stop gay marriage from being imposed is through constitutional amendment.”

7. CLEVELAND PLAIN DEALER (circ. 330,280), Editorial, “Gaveling in Gay Marriage,” May 23, 2008, at B6.

http://blog.cleveland.com/post_riposte/2008/05/the_dangers_of_gaveling_gay_ma.html

“It is not our place to second-guess the California justices when it comes to interpreting their state’s constitution. But when it comes to an issue as sensitive and emotional as the definition of marriage - one developed over millennia and across many cultures - we do question the wisdom of resorting to instruments so blunt as courts or constitutions. That is especially true when public sentiment on such issues is clearly in flux. . . .”

“The U.S. Supreme Court’s 1973 Roe v. Wade decision shows the danger of a court leaping too far ahead of public sentiment. . . . It’s possible that California voters will reject a constitutional ban on same-sex marriages, thus supporting their court. But it’s also possible they will instead do as Ohioans did in 2004 - pass a hard-to-remove barrier that short-circuits democratic discussion.

“If that happens, a narrow, if well-intentioned, majority may have actually delayed the moment when same-sex couples can get the respect they desire.”

**EXCERPTS FROM NEWSPAPERS
ENDORING THE CALIFORNIA
MARRIAGE RULING**

8. THE NEW YORK TIMES

(circ. 1,077,256),

Editorial, "A Victory for Equality and Justice," May 17, 2008.

http://www.nytimes.com/2008/05/17/opinion/17sat1.html?_r=1&oref=slogin

"The California Supreme Court brought the United States a step closer to fulfilling its ideals of equality and justice with its momentous 4-to-3 ruling upholding the right of same-sex couples to marry."

"In striking down the ban for violating state constitutional provisions protecting equality and fundamental rights, the court's 121-page opinion fittingly drew on a 1948 decision in which California's high court removed the bar to interracial marriage 19 years before the United States Supreme Court followed suit."

9. LOS ANGELES TIMES

(circ. 773,884),

Editorial, "Marriage Rights for All," May 16, 2008.

<http://www.latimes.com/news/opinion/editorials/la-ed-marriage16-2008may16,0,3877132.story>

"When it acted in 1967, the court banished laws that forbade interracial marriage and legalized the union of Mildred Loving, a black woman, and her white husband. In that same noble tradition, California's high court on Thursday ended the state's ban on marriages between couples of the same sex. Marriage, the court ruled, is 'one of the fundamental rights embodied in the California Constitution' and may not be sublimated to bigotry or habit."

"Public opinion has changed in this state since Proposition 22 prohibited same-sex marriage in 2000, and it continues to

evolve toward acceptance of gay and lesbian rights. Thursday's ruling is another step in that march toward equality; voters would do well to revel in this historic moment and let this decision stand."

10. SAN FRANCISCO CHRONICLE,

(circ. 370,345)

Editorial, "Court Affirms Marriage Equality in California," May 16, 2008, at B10.

<http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/05/16/EDV410N7AO.DTL>

"History should look kindly on the way Ronald George, the Republican chief justice of the California Supreme Court, strode past the bigotry, fear and blind adherence to tradition that have stood in the way of marriage equality.

"The underlying issue was never about issuing special rights or condoning the "gay lifestyle" or undermining the institution of marriage. It was about whether all Californians enjoy what the chief justice described as "a fundamental constitutional right to form a family relationship."

"Finally, they do."

11. BOSTON GLOBE, (circ. 350,605)

Editorial, "Marriage, Not Marriage-Lite," May 16, 2008, at A14.

"But the ruling is significant for another reason: It points out the fundamental flaw in domestic partnerships, civil unions, and other 'I Can't Believe It's Not Marriage' substitutes - which, however well intended, still relegate same-sex couples to second-class status."

"Fortunately, a one-vote majority on the California court understood the "appreciable harm" inherent in offering rights that are only equal-ish."

APPENDIX: OTHER INTERESTING REACTIONS

1. ST. PETERSBURG (FLA.) TIMES, Editorial, “Gay Marriage Ban Cheats the Future,” May 22, 2008.

<http://www.tampabay.com/opinion/editorials/article520174.ece>

In 1948, the California Supreme Court led the way in striking down a ban on interracial marriage. Now, 60 years later, the court has issued another groundbreaking decision on marriage that, whatever its flaws, is likely to stand tall in history’s judgment.

By a 4-3 vote, the court struck down a state ban on same-sex marriage, declaring that the relationship of same-sex couples must be granted the same “dignity and respect” as heterosexual marriage. It would have been better if the same result could have come from political consensus instead of a decision handed down by a sharply divided court. California already was far along in extending equal rights to gay couples. Before the court ruling, same-sex couples in the state had virtually the same legal rights as heterosexual couples. The only real difference was that their relationships were not recognized by the state as “marriage.”

The ruling, and a similar one in Massachusetts in 2003, suggest that maybe before another generation passes, our society will largely come to view the legal barriers to gay marriage the way we do those of interracial marriage — as a relic of a more intolerant time. Meanwhile, the California ruling is sure to reignite the political debate over gay marriage and energize efforts to change federal and state Constitutions to ban it.

Through a citizens’ initiative, Florida’s voters will be asked this November whether they want to amend the state’s Constitution to add a ban on gay marriage and other forms of domestic partnerships. . . .

Florida will come to accept gay marriage at its own pace. The worst thing we could do is lock today’s attitudes and prejudices into the state Constitution by passing the ban on gay marriage in November.

2. Jeffrey Rosen, “Justice Delayed: The Case Against California’s Gay Marriage Decision” THE NEW REPUBLIC, June 11, 2008 at p. 9.

The California Supreme Court’s expansive decision last week to legalize gay marriage has presented its opponents with an unfortunate opportunity. If the legal merits of the decision had been clear, the court’s boldness could have been justified as a triumph of shining principle over pragmatic politics. Unfortunately, the legal merits are extremely murky, giving ammunition to those who are mobilizing to overturn the decision by initiative this fall. In addition, the California decision may trigger a backlash that hurts Democratic chances in November and guarantees a conservative U.S. Supreme Court for decades to come. For all of their noble intentions, therefore, the California justices may have handed supporters of gay marriage a Pyrrhic victory.

It’s easy to celebrate the majority opinion by Chief Justice Ronald M. George, a Republican appointee, for standing up for simple fairness and for anticipating the future. Given that young people support gay marriage just as strongly as older ones oppose it, there’s little doubt that, in a few decades, gay marriage will be legal throughout the United States--as well it should be. And it’s obvious that George and his colleagues saw themselves as brave pioneers whose judgment would ultimately be vindicated by history: The California justices repeatedly compared bans on gay marriage to bans on interracial marriage and suggested that their decision, in time, would be as celebrated as the California Supreme Court’s decision striking down anti-miscegenation laws in 1948.

But the analogy to interracial marriage bans is less than perfect. The central question in the California case is whether it’s possible to create a separate-but-equal category of civil unions for gays and lesbians without demeaning them. Some commentators, such as Andrew Sullivan, have powerfully argued that, in the case of marriage, separate is inherently unequal and demeaning. That’s a plausible argument, but not everyone

agrees. Of the courts that have considered this question, two (Vermont and New Jersey) have held that civil unions can, in fact, be a separate but equal alternative to marriage; only one (Massachusetts) has disagreed. Moreover, Democratic presidential candidates from John Kerry to Hillary Clinton and Barack Obama support civil unions but oppose gay marriage. Judicial decisions that blithely pronounce the basic positions of major political parties to be unconstitutional haven't fared well in American history--as reaction to the Dred Scott and Roe v. Wade decisions shows. (By contrast, when Brown came down in 1954, it was supported by more than half of the country and not officially opposed by the Democratic Party or the GOP.)

Although you can argue the question either way, Chief Justice George inadvertently undermined the heart of his own conclusion that civil unions are inherently demeaning. He and his colleagues conceded that California's marriage laws were not motivated by prejudice or animus--unlike interracial marriage bans, whose supporters explicitly said in 1948 that they were trying to maintain white supremacy. "We do not suggest that the current marriage provisions were enacted with an invidious intent or purpose," the California justices declared. Indeed, when the California legislature expanded domestic partnerships in 2003 to include all the legal benefits of marriage, it said that its goal was to provide essential rights to "all caring and committed couples, regardless of their gender or sexual orientation" and to "reduce discrimination on the bases of sex and sexual orientation." (The legislature later voted twice to legalize gay marriage in bills vetoed by the governor.) Under most constitutional analysis, the concession that California's decision to create civil unions rather than gay marriage wasn't motivated by prejudice should have ended the matter: Courts generally uphold laws unless they're irrational, and, without evidence of hidden animus, it's hard to conclude that a desire to maintain the traditional definition of marriage is completely irrational.

* * *

... It's possible that the anti-gay marriage initiative will fail in November, given the closeness of the polls and the fact that undecided voters may be moved by the thousands of marriages that will have already been performed by then. But if the initiative passes, as supporters expect, the California court's self-congratulatory rhetoric about the wisdom of imposing gay marriage by judicial fiat will look shortsighted rather than prescient.

Perhaps the California decision will hurt Democrats less than the Massachusetts decision in 2004. Christian evangelicals who would be most motivated to turn out in opposition to gay marriage already distrust McCain for opposing the federal marriage amendment. (They may be more motivated by his opposition to abortion: McCain, unlike George W. Bush, has called for the overturning of Roe.) But, if the California decision makes things even marginally more difficult for Barack Obama, it could set back the broader national cause of gay marriage for decades to come. With at least two U.S. Supreme Court appointments, President Obama could lay the foundation for a Court that might eventually nationalize gay marriage once the country is ready. A McCain Court, by contrast, could ensure that gay marriage continues to be fought from state to state for several generations. As Klarman puts it, "If the California gay marriage decision makes it harder for Barack Obama, it's hard for me to believe that it's desirable for supporters of gay marriage to insist on it." My heart is with my colleague Richard Just, whose eloquent response follows, but my head tells me that courts have often delayed the cause of justice when they have attempted to impose contested reforms before the country is willing to accept them.

3. Stuart Taylor, Jr., "Gay Marriage by Judicial Decree: California Chief Justice Ronald George's majority opinion exuded impatience bordering on contempt for the government by the people that is the foundation of our democratic system," NATIONAL JOURNAL, May 24, 2008.

<http://www.nationaljournal.com/njmagazine/openingargument.php>

I wholeheartedly support gay marriage. And I am happy for the many gays who rejoiced at the California Supreme Court's 4-3 decision on May 15 ordering the state to stop calling committed gay couples "domestic partners" and start calling them "married."

So why do I see the decision as an unfortunate exercise in judicial imperialism? Let me count the ways. Then I'll touch on how it could be a harbinger of the constitutional innovating that we might see if the next president engineers a strong liberal majority--a likelier prospect than a strong conservative majority--on the U.S. Supreme Court.

First, the California court's 121-page opinion was dishonest. This was most evident in its ritual denial of the fact that it was usurping legislative power: "Our task ... is not to decide whether we believe, *as a matter of policy*, that the officially recognized relationship of a same-sex couple *should* be designated a marriage rather than a domestic partnership ... but instead only to determine whether the difference in the official names of the relationships *violates the California Constitution* [emphasis in original]."

This was a deeply disingenuous dodge, if not a bald-faced lie, to conceal from gullible voters the fact that the decision was a raw exercise in judicial policy-making with no connection to the words or intent of the state constitution. It is inconceivable that anyone but a supporter of gay marriage "as a matter of policy" could have found in vague constitutional phrases such as "equal protection" a right to judicial invalidation of the marriage laws of every state and nation in the history of civilization.

* * *

The California court's majority descended into especially slick sophistry when it suggested that the many gay-rights reforms that the state's elected branches had already adopted were not a reason to let the democratic process work but rather a mandate for judicial imposition of gay marriage. The message to voters in other states may be: If you give the judges an inch on gay rights, they will take a mile.

* * *

Chief Justice Ronald George's majority opinion exuded impatience bordering on contempt for the government by the people that is the foundation of our democratic system. California's voters and elected branches had already made great progress toward full legal equality for gay couples. They enjoyed *all* of the state-law rights and privileges of marriage except the name, which 61.4 percent of the voters had reserved for heterosexual couples in a 2000 ballot initiative. California's domestic-partnership laws were more generous to gays than the laws of almost all other states and almost all nations.

But to the majority, this domestic-partnership-but-not-gay-marriage compromise--also advocated by Barack Obama, Hillary Rodham Clinton, and John McCain--was "a mark of second-class citizenship." George analogized domestic partnerships to the "separate but equal" laws of the segregated South, including laws making interracial marriage *a crime* in some states until they were struck down by the U.S. Supreme Court in 1967. (The California court, admirably, had voided that state's ban on interracial marriage in 1948.) The chief justice thus insulted the voters--not to mention all three presidential candidates--and treated California's denial of official benediction as the legal equivalent of the Jim Crow South's system of grinding oppression.

* * *

Also troubling is the majority's eagerness to move beyond enforcing substantive rights into dictating what *words* the government must and must not use: Same-sex couples, the majority ruled, have a "fundamental right ... to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships."

This urge to regulate government speech resonates with the logic of those federal judges who have sought to strip "under God" out of the Pledge of Allegiance. Can court-ordered erasure of "In God We Trust" from U.S. currency, and perhaps a judicial rewrite of the National Anthem, be far behind?

* * *

But I am concerned about the gradual, relentless strangulation of Abraham Lincoln's vision of ours as "government of the people, by the people, for the people," by judges who see constitutions not as binding law but as invitations for judicial rule.

I am also struck by the official list of "Attorneys for Respondent" joining amicus briefs supporting gay marriage in the California case. It included more than 700 lawyers, law firms, and legal groups. Justice Antonin Scalia had a point in complaining 12 years ago, when his colleagues struck down a Colorado ballot initiative in the name of gay rights, that they were enforcing not the Constitution but rather "the views and values of the lawyer class from which the Court's members are drawn."

4. **E.J. Dionne, “Two Roads to Gay Marriage,” Washington Post, May 19, 2008 at A17 (syndicated column)**

<http://www.washingtonpost.com/wp-dyn/content/article/2008/05/18/AR2008051801908.html>

* * *

My visceral reaction to this decision, rendered by a moderately conservative court dominated by Republicans, was to share the joy of the gay and lesbian couples you saw celebrating on television. But my practical reaction was to wonder whether this decision will speed or slow our country’s steady change of heart on the matter of recognizing committed gay relationships.

As it happens, I am one of the millions of Americans whose minds have changed on this issue. Like many of my fellow citizens, I was sympathetic to granting gay couples the rights of married people but balked at applying the word “marriage” to their unions.

* * *

But to find a constitutional right to gay marriage, the California majority chose to argue that the state’s very progressive law endorsing domestic partnerships for homosexuals -- it grants all the rights of marriage except the name -- was itself a form of discrimination.

This is odd and potentially destructive. As Justice Carol Corrigan argued in her dissent, “to make its case for a constitutional violation, the majority distorts and diminishes the historic achievements” of the state’s Domestic Partnership Act.

That’s true, and in many states, it will take years for a political and legal consensus in favor of gay marriage to develop. In the interim, civil unions and domestic partnerships are the best hope homosexuals in these states have for some form of legal recognition of their relationships. The danger is that foes of civil unions will use this court’s own logic to argue that such arrangements are not a political halfway house but lead inexorably to gay marriage. It would be unfortunate if California’s breakthrough were used to stall significant if more modest progress elsewhere.

There is a complicated interaction between court decisions and the workings of democratic politics. On the one hand, there are times when only the courts can vindicate the rights of minorities. On the other hand, rights are more firmly rooted when they are established or ratified by democratic majorities. In the case of gay marriage in California, a majority could still overturn this decision by amending the state constitution to ban same-sex marriage -- and a proposition to this effect is likely to appear on this fall’s ballot.

Corrigan stated flatly that she personally supports gay marriage but argued that in a democracy, “the people should be given a fair chance to set the pace of change without judicial interference.” She added: “If there is to be a new understanding of the meaning of marriage in California, it should develop among the people of our state and find its expression at the ballot box.”

The good news from California is that the people will ultimately decide the question, and I hope that a reaction against “judicial activism” does not hamper the marriage equality movement. As for most other states, domestic partnerships and civil unions will come long before gay marriage does. Nothing the California court majority said should deter these states from recognizing that gays and lesbians, no less than heterosexuals, have a right to the community’s recognition of the seriousness of their commitments.

