Prop 8 ruling leaves activists, legal observers, fearful

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You know that scene in the Monty Python movie "The Meaning of Life" in which the waiter keeps tempting an overstuffed and horrifically obese glutton with one last tiny morsel, reassuring him it will be safe to eat because it's just one tiny "thin little wafer"? The language and logic used in the majority decision upholding Proposition 8 is so similarly challenged that even one of the justices who agreed to let the voter-approved measure stand is not buying it. And civil rights activists fear the consequences of the decision could be just as explosively disastrous as the waiter's wafer.

Four associate justices – Joyce Kennard, Marvin Baxter, Carol Corrigan and Ming Chin – co-signed Chief Justice Ronald M. George's majority opinion rejecting the challenge to Proposition 8 as a constitutional amendment that dictates the state of California only validates marriage as between a man and a woman.

A year ago, the same court found that denying same-sex couples the right to marry was unconstitutional because it denied them equal protection and equal rights, including the sense of dignity that comes with the recognized institution of marriage; denial of those rights left the gay minority more vulnerable to a culture of homophobia.

The opinion published by the justices Tuesday argues that because *most* of the social protections and benefits remain intact for same-sex couples even if the term "marriage" is not applied to their relationships, Prop 8 merely "carves out a narrow and limited exception to these state constitutional rights." And refers to this clause three times.

"Neither the language of the relevant constitutional provisions, nor our past cases, support the proposition that any of these rights is totally exempt from modification by a constitutional amendment adopted by a majority of the voters through the initiative process," the justices wrote. They said the petition failed to cite any compelling authority that says that a popular amendment "cannot diminish in any respect the content of a state constitutional right as that right has been interpreted in a judicial decision."

And just in case you were under the impression that California was founded on the bedrock of protecting those rights from the electoral review, the justices on pages 9 and 10 of their opinion note Mississippi's constitution precludes initiative votes from rolling back the Bill of Rights but "the California Constitution contains no comparable limitation. In the absence of such an express restriction on the initiative power, and in light of past California authorities, we conclude that the California Constitution cannot be interpreted as restricting the scope of the people's right to amend their Constitution in the manner proposed by petitioners."

Associate Justice Carlos Moreno rejected his colleagues' reasoning on almost every score. And he warned their interpretation eroded every commonly understood protection of civil rights.

"The question before us is not whether the language inserted into the California Constitution by Proposition 8 discriminates against same-sex couples and denies them equal protection of the law; we already decided in the Marriage Cases that it does," he wrote. "Requiring discrimination against a minority group ... 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 state Constitution rather than a mere "amendment" thereof.' The rule the majority crafts today not only allows same-sex couples to be stripped of the right to marry that this court recognized in the Marriage Cases, it places at risk the state constitutional rights of all disfavored minorities. It weakens the status of our state Constitution as a bulwark of fundamental rights for minorities protected from the will of the majority."

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Moreno further notes the importance the recent Iowa Supreme Court decision allowing marriage for same-sex couples put on the promise of equality and said "The equal protection clause is, by its nature, countermajoritarian. As a logical matter, it cannot depend on the will of the majority for its enforcement, for it is the will of the majority against which the equal protection clause is designed to protect."

And ensuring that, Moreno wrote, was the court's duty it shirked.

"Denying the designation of marriage to same-sex couples cannot fairly be described as a 'narrow' or 'limited' exception to the requirement of equal protection," he wrote. "The passionate public debate over whether same-sex couples should be allowed to marry, even in a state that offers largely equivalent substantive rights through the alternative of domestic partnership, belies such a description.... Describing the effect of Proposition 8 as narrow and limited fails to acknowledge the significance of the discrimination it requires."

Although Associate Justice Kathryn Mickle Werdegar concurred that Prop 8 was valid, she rejected the majority opinion that sought "to find in this court's prior decisions a definition of the term 'revision," one focused on governmental structure and organization" that categorically excludes Prop 8 and thus avoids the daunting task of reconciling with our constitutional tradition a voter initiative clearly motivated at least in part by group bias. In fact our prior decisions do not establish the majority's definition, nor does it find support in the text or history of the Constitution.

"The drafters of our Constitution never imagined, nor would they have approved, a rule that gives the foundational principles of social organization in free societies, such as equal protection, less protection from hasty, unconsidered change than principles of governmental organization," she wrote.

Despite that, Werdegar agreed Prop 8 should stand. Rather, noting the court's conclusion a year ago that equal protection meant that the term marriage needed to be applied to same-sex unions, "historically ... was new. The right of same-sex couples to have the nomenclature of marriage applied to their unions had been only recently and rarely recognized in American

constitutional law, and it ran counter to a common understanding of the term. Even today this conclusion is disputed, both here and throughout the United States. Disagreement over a single, newly recognized, contested application of a general principle does not mean the principle is dead."

Werdegar said all three branches of government continue to have the duty, within their respective spheres of operation, today as before the passage of Prop 8, to "eliminate the remaining important differences between marriage and domestic partnership, both in substance and perception."

Ruling Prop 8 could not retroactively invalidate the existing 18,000 same-sex marriages in the state was not the only ray of hope for marriage equality advocates contained in the majority decision. Having said the justices themselves cannot put all civil rights beyond the reach of future amendments, the courts spell out how rights can be protected down the road without a constitutional convention. You guessed it: another amendment.

"The amending provisions of a constitution can expressly place some subjects or portions of the constitution off-limits to the amending process," they wrote.