

# 'Suspect' Judgment

*Decoding the California Supreme Court's gay-marriage decision.*

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In a decision with far-reaching implications, the justices of California's Supreme Court ruled 4–3 on May 15 to overturn a state law prohibiting same-sex marriages.

The court ruled that sexual orientation was a "suspect classification," a term typically used by the U.S. Supreme Court to refer to historic bases for discrimination, such as race or national origin. By labeling sexual orientation "suspect," the California court indicated that any law based on sexual orientation would be presumed discriminatory.

Thus, the justices subjected Proposition 22—a traditional marriage referendum passed by more than 60 percent of Californians in 2000—to a "strict scrutiny" review, placing a heavy burden on the state to prove the law's necessity.

The California Court of Appeals had previously ruled that sexual orientation was not a suspect classification, because it is not an immutable characteristic. John Witte Jr., director of the Center for the Study of Law and Religion at Emory University, agrees with the prior ruling of the appeals court.

"In a 121-page opinion," Witte told CT, "the [California Supreme] Court does not offer a single shred of scientific evidence to prove its assertion that sexual orientation is a natural trait or immutable characteristic like race and gender."

However, Chief Justice Ronald George, who penned the majority opinion for the court, argued that immutability is not "required in order for a characteristic to be considered a suspect classification," citing previous California cases that treated religious affiliation—also not immutable—as a suspect classification.

Even if Californians pass a constitutional amendment reversing the same-sex decision, the court's reasoning would still mean that "there could be no other discrimination on the basis of sexual orientation," said Washington and Lee University Law School professor Robin Fretwell Wilson.

"Together with the state's Unruh Civil Rights Act," Wilson said, "it would be hard to see how government or private business could make distinctions legally on the basis of sexual orientation in any area covered by Unruh—public accommodations, housing, nonprofit groups, public agencies, retail establishments, hotels, motels, restaurants, theaters, hospitals, barber shops, etc.—without running afoul of the law."

Wilson said that California's faith-based organizations will likely be barred from sexual-orientation discrimination in the use of facilities that are offered to the public, and may increasingly find themselves the targets of discrimination-based civil-rights litigation. The California court's reasoning may also have implications for the rest of the country. The U.S. Supreme Court has yet to address whether sexual orientation is a suspect classification, but Sarah Barringer Gordon, a professor at the University of Pennsylvania Law School, said that California courts have often set national precedent.

"California's Supreme Court was also the first to hold unconstitutional a state ban on interracial marriage, and has often been regarded as a leader in law, especially in the jurisprudence of rights," Gordon said. "California is a big and important state, in terms of law as well as society more broadly considered."

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