

Judge Vaughn Walker's Ruling Overturns Proposition 8

Background History

In November 2000, voters approved (by 61%) Proposition 22, California Defense of Marriage Act, which stated that "Only marriage between a man and a woman is valid or recognized in California." In February 2004, the mayor of San Francisco authorized licenses for same-sex couples, which the California Supreme Court nullified a month later. In March 2005 the presiding judge in San Francisco Superior Court ruled that barring marriage by same-sex couples violated the equal protection guarantee of the state constitution. The court of appeals reversed this decision, but on review, the California Supreme Court invalidated Proposition 22. From June 17 until November of 2008 when Prop 8 was passed (52%-48%), 18,000 marriage licenses were issued to same-sex couples. The California Supreme Court then (2009) upheld Prop 8 against challenges by opponents, but left intact the marriages performed in those four and a half months the year before.

Plaintiffs, Proponents, and Preliminary Actions

A lesbian couple (Perry and Stier) raising four children in Berkeley, and a gay couple Zarrillo and Katami) living in Los Angeles challenged Prop 8 under the Fourteenth Amendment on May 22, 2009. The Governor and Attorney General of California and county clerks/recorders were named as defendants. All declined to defend Prop 8 (the Attorney General concedes that Prop 8 is unconstitutional). The lead attorneys for the plaintiffs were Ted Olson, who argued the case for Bush (Bush vs. Gore) before the Supreme Court and David Boies, who represented Gore. The defendants represented the group Protect Marriage. Their lead attorney was Chuck (Charles J) Cooper, who argued at the Supreme Court in behalf of the Boy Scouts of America in their successful effort to exclude gay boys and men from membership. Judge Walker sits on the US District Court for the Northern District of California. [An interesting aside is that before the trial Walker, who is an openly gay man, was not well regarded in the gay community because he had been the primary litigator who in 1982 argued in behalf of the International Olympic Committee in their suit to prevent use of the

name "Gay Olympics."] The court denied a plaintiffs' motion for a preliminary injunction on July 2, 2009, and denied a proponents' (supporters of Prop 8) motion for summary judgment on Oct. 14, 2009.

The Trial

The trial was held January 11-27, 2010. Efforts to video record and broadcast the proceedings were denied. This was important because some potential witnesses claimed they didn't want to appear publically for fear of subsequent retribution.

The Plaintiffs' Case against Proposition 8

The Due Process clause of the 14th Amendment states that no "State [shall] deprive any person of life, liberty, or property, without due process of law." Thus, the plaintiffs contend that the freedom to marry the person of one's choice is a fundamental right protected by this Clause. Prop 8, they argued, violates this fundamental right because: 1) it prevents a person to marry the person of his or her choice; 2) the choice of marriage partner is sheltered from prohibition by the state; 3) California's provision of a domestic partnership is not an adequate substitute for marriage.

The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The plaintiffs argued that Prop 8 violates this Clause by: 1) discriminates against gay men and lesbians by denying the right to marry the person of their choice; 2) creates gay men and lesbians as a class unequal to heterosexuals.

The Proponents' Defense of Proposition 8

Ballot Arguments: 1) "It is not an attack on the gay lifestyle, . . . [but] protects our children from being taught in public school that 'same-sex marriage' is the same as traditional marriage; . . . the best situation

for a child is to be raised by a married mother and father;" 2) "[Otherwise] . . . teachers would be required to teach young children there is no difference between gay marriage and traditional marriage;" 3) "gays have a right to their private lives, [but not] the right to redefine marriage for everyone else."

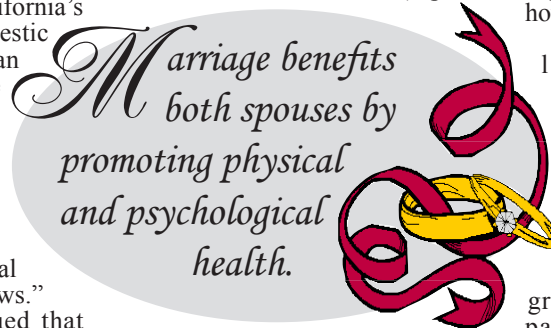
TV, radio, and internet advertisements issued during the campaign: 1) denial of same-sex marriage preserves marriage, relieves others (perhaps especially children) from recognizing/acknowledging same-sex couples, and protects children; 2) the ideal child-rearing environment requires one male and one female parent; 3) an opposite-sex couple's marriage is superior to that of a same-sex couple; 4) Same-sex couples redefine opposite-sex couples' marriages.

Proponents abandoned previous arguments that asserted the moral superiority of opposite-sex couples because the state interest in marriage must be secular, not to enforce private moral or religious beliefs. Instead they asserted that Prop 8: 1) maintains California's exclusion of same-sex couples from marriage; 2) affirms the will of California voters to exclude same-sex couples; 3) promotes stability in the relationships of men and women; 4) promotes optimal child-rearing households.

The proponents legal stance was that because same-sex marriage is not implicit in the concept of liberty, therefore such persons are not denied due process. Further, granting a domestic partnership affords equal protection.

During the closing arguments at trial, the proponents argued that "responsible procreation is really at the heart of society's interest in regulating marriage," but when asked for proof, their attorneys claimed "you don't have to have evidence of this point." Their argument was that same-sex couples' sexual activity does not lead to procreation, so the state only has an interest in encouraging opposite-sex couples' sexual activity within a stable marriage.

 Continued on next page.



Family Fellowship

Family Fellowship is a volunteer service organization, a diverse collection of Mormon families engaged in the cause of strengthening families with homosexual members. We share our witness that gay and lesbian Mormons can be great blessings in the lives of their families, and that families can be great blessings in the lives of their gay and lesbian members. We strive to become more understanding and appreciative of each other while staying out of society's debate over homosexuality. We seek to put behind us all attitudes which are anti-family, which threaten loving relationships, and which drive family members apart. All who can support these goals are welcome to contribute to this newsletter. However, the views expressed here belong only to the individuals who express them.



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The Trial: Witnesses

In addition to the four plaintiffs, there were four other lay witnesses and nine expert witnesses. Proponents called only two expert witnesses. Four others were withdrawn, before the trial began, but the plaintiff's counsels quoted from prior statement they made while being deposed, to support the plaintiff's side of the issues. Only one proponent witness (David Blankenhorn, author, founder of the Institute for American Values) addressed the question of the government's interest in marriage. Judge Walker devoted 12 pages (out of a total of 136 pages) of his ruling to demonstrate that Blankenhorn "provided no credible evidence to support any of the claimed adverse effect proponents promised to demonstrate." Further, Blankenhorn failed to meet the standard of being an expert witness. "[His] opinions are not supported by reliable evidence or methodology and Blankenhorn failed to consider evidence contrary to his view in presenting his testimony. The court therefore finds the opinions of Blankenhorn to be unreliable and entitled to essentially no weight."

Questions at Issue During the Trial; Summary of the Evidence and the Judge's Rulings

A. Whether any evidence supports California's refusal to recognize marriage between two people because of their sex.

The plaintiffs testified about why marriage would be important to them and about the harms associated with its absence in their lives. Nancy Cott (historian, Harvard) testified about the history, and social and economic benefits of marriage, and stated that same-sex marriage would provide "another resource for stability and social order." Blankenhorn admitted that there were benefits that would accrue to California by same-sex marriage, but stated that the state should not do so. Letitia Peplau (psychologist, UCLA) testified of the physical and economic benefits of marriage, and that the desire of same-sex couples for marriage would not weaken, but strengthen, the institution. Lee Badgett (economist, U Mass. Amherst and UCLA law school) reinforced these same views.

Among the conclusions relative to this question outlined in the "Findings Of Fact" section of the opinion are the following:

1. Marriage in the United States has always been a civil matter. Civil authorities may permit religious leaders to solemnize marriages but not to determine who may enter or leave a civil marriage. Religious leaders may determine independently whether to recognize a civil marriage or divorce but that recognition or lack thereof has no effect on the relationship under state law.

2. California, like every other state, has never required that individuals entering a marriage be willing or able to procreate.

3. Many states, including California, had laws restricting the race of marital partners

so that whites and non-whites could not marry each other.

4. Racial restrictions on an individual's choice of marriage partner were deemed unconstitutional under the California Constitution in 1948 and under the United States Constitution in 1967. An individual's exercise of his or her right to marry no longer depends on his or her race nor on the race of his or her chosen partner.

5. Marriage between a man and a woman was traditionally organized based on presumptions of a division of labor along gender lines. Men were seen as suited for certain types of work and women for others. Women were seen as suited to raise children and men were seen as suited to provide for the family.

6. The development of no-fault divorce laws made it simpler for spouses to end marriages and allowed spouses to define their own roles within a marriage.

7. The California Civil Code reads, in part, "any unmarried person of the age of 18 years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage."

8. California has eliminated marital obligations based on the gender of the spouse. Regardless of their sex or gender, marital partners share the same obligation to one another and to their dependants. As a result of Proposition 8, California nevertheless requires that a marriage consist of one man and one woman.

9. Eliminating gender and race restrictions in marriage has not deprived the institution of marriage of its vitality.

10. States and the federal government channel benefits, rights, and responsibilities through marital status. Marital status affects immigration and citizenship, tax policy, property and inheritance rules, and social benefit programs.

11. Marriage benefits both spouses by promoting physical and psychological health. Married individuals are less likely to engage in behaviors detrimental to health, like smoking or drinking heavily. Married individuals live longer on average than unmarried individuals.

12. Material benefits, legal protections, and social support resulting from marriage can increase wealth and improve psychological well-being for a married spouse.

13. The tangible and intangible benefits of marriage flow to a married couple's children.

Judge Walker ruled that "*the trial evidence provides no basis for establishing that California has an interest in refusing to recognize marriage between two people because of their sex.*"

B. Whether any evidence shows California has an interest in differentiating between same-sex and opposite-sex marriages.

Experts for the plaintiffs testified that there is no meaningful difference between opposite- and same-sex couples. Blankenhorn countered

that the latter cannot create biological offspring. Gregory Herek (psychologist, UC Davis) defined the nature of sexual orientation. He stated that homosexuality is a normal expression of human sexuality, that the vast majority of gays and lesbians have no choice about it, and therapeutic efforts to change orientation are not effective and pose a risk of harm. Ilan Meyer (social epidemiologist, Columbia) testified as to the harm done by Prop 8 to gays and lesbians, including negative mental and physical health outcomes. Michael Lamb (psychologist, Cambridge, England) testified "that all available evidence shows that children raised by gay or lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents and that the gender of a parent is immaterial to whether an adult is a good parent," and countered proponents claims otherwise. With regard to the putative importance of biological links between parents and children, Blankenhorn agreed with Lamb that adoptive parents "actually on some outcomes outstrip biological parents in terms of providing protective care for their children." Several of the plaintiffs' experts testified as to why domestic partnerships in California are not equivalent to marriage (less likely, the stigmatization attached, unequal social and historical meaning, much less cultural esteem, no indication of the love and commitment inherent in marriage, etc.) Proponents did not challenge the socially superior status of marriage.

Among the conclusions relative to this question outlined in the "Findings Of Fact" section of the opinion are the following:

1. The concept of sexual orientation, that "an individual desires a relationship with someone of the opposite sex (heterosexual), same sex (homosexual) or either sex (bisexual), developed in the late nineteenth century.
2. The vast majority of people are consistent throughout their adult lives in their sexual orientation (expressed through self-identification, behavior or attraction), an enduring pattern of sexual, affectional or romantic desires for and attractions to men, women or both sexes.
3. Sexual orientation is fundamental to a person's identity and is a distinguishing characteristic that defines gays and lesbians as a discrete group.
4. Individuals do not generally choose their sexual orientation. No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.
5. California has no interest in asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians in California.
6. Same-sex couples are identical to opposite-sex couples in those characteristics relevant to the ability to form successful marital unions (forming happy, satisfying relations with deep emotional bonds and strong commitment to partners).

7. California law permits and encourages gays and lesbian to become parents through adoption, foster parenting or assistive reproductive technology. Approximately 18% of same-sex couples in California are raising children.

8. Marrying a person of the opposite sex is an unrealistic option for gay and lesbian individuals.

9. Domestic partnerships lack the social meaning associated with marriage, the definitive expression of love and commitment in the United States. They may not be recognized in other states and are not recognized by the federal government.



Equal Protection of the Laws

10. Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage, or otherwise affect the stability of opposite-sex marriages.

11. The children of same-sex couples benefit when their parents can marry.

Judge Walker ruled that "*the testimony shows that California has no interest in differentiating between same-sex and opposite-sex unions.*"

C. Whether the evidence shows Proposition 8 enacted a private moral view without advancing a legitimate government interest.

George Chauncey (historian, Yale) outlined the historical discrimination (including criminalization) against gays and lesbians that relied on stereotypical images of them as immoral. Additional characterization of them as predators or child molesters is not credible, he testified. Gary Segura (political scientist, Stanford) observed, "It's very difficult to engage in the give-and-take of the legislative process when I think you are an inherently bad person. That's just not the basis for compromise and negotiation in the political process," and identified religion as the chief obstacle to gay and lesbian political advances. Kenneth Miller (political scientist, Claremont McKenna; proponent's witness) agreed that "popular initiatives can easily tap into a strain of antiminority sentiment and that at least some voters supported Prop 8 because of anti-gay sentiment." There was additional testimony about the negative effect of Prop 8 campaign advertising on individuals, and its direct and indirect economic harms on the state by Edmund Eagan (economist, San Francisco Controller's Office, an expert in urban and regional economic policy). Hak-Shing William Tam (actually a proponent of Prop 8, but called as a witness for the

plaintiffs) outlined his efforts in behalf of the Prop 8 campaign, described his religious objections to homosexuals, identified NARTH (the National Association for Research and Therapy of Homosexuality) as the source of his information about the subject (because he "believes in what they say"), and identified the internet as his source of information connecting same-sex marriage to polygamy and incest.

Among the conclusions relative to this question outlined in the "Findings Of Fact" section of the opinion are the following: Proposition 8 (for items 1-9) -

1. places the force of law behind stigmas against gays and lesbians, including: gays and lesbians do not have intimate relationships similar to heterosexual couples; gays and lesbians are not as good as heterosexuals; and gay and lesbian relationships do not deserve the full recognition of society.
2. requires California to treat same-sex couples differently from opposite-sex couples.
3. reserves the most socially valued form of relationship (marriage) for opposite-sex couples.
4. amends the California constitution to codify distinct and unique roles for men and women in marriage.
5. does not affect the First Amendment rights of those opposed to marriage for same-sex couples. Prior to Proposition 8, no religious group was required to recognize marriage for same-sex couples.
6. has had a negative fiscal impact on California and local governments.
7. increases costs and decreases wealth for same-sex couples because of increased tax burdens, decreased availability of health insurance and higher transaction costs to secure rights and obligations typically associated with marriage. Domestic partnership reduces but does not eliminate these costs.
8. singles out gays and lesbians, and legitimates their unequal treatment. Proposition 8 perpetuates the stereotype that gays and lesbians are incapable of forming long-term loving relationships and that gays and lesbians are not good parents.
9. results in frequent reminders for gays and lesbians in committed long-term relationships that their relationships are not as highly valued as opposite-sex relationships.
10. The gender of a child's parent is not a factor in a child's adjustment. The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful, and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.
11. Children do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted.

12. The genetic relationship between a parent and a child is not related to a child's adjustment outcomes.

13. Gays and lesbians have been victims of a long history of discrimination in California and in the United States.

14. Well-known stereotypes about gay men and lesbians include a belief that gays and lesbians are affluent, self-absorbed, and incapable of forming long-term relationships. Other stereotypes imagine gay men and lesbians as disease vectors or as child molesters who recruit young children into homosexuality. No evidence supports these stereotypes.

15. Religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationship harm gays and lesbians.

16. Stereotypes and misinformation have resulted in social and legal disadvantages for gays and lesbians.

17. The Proposition 8 campaign relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian. The reason children need to be protected from same-sex marriage was never articulated in official campaign advertisements. Nevertheless, the advertisements insinuated that learning about same-sex marriage could make a child gay or lesbian and that parents should dread having a gay or lesbian child.

18. The campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships.

On the basis of these findings Judge Walker ruled that *"the evidence presented at trial fatally undermines the premises underlying proponents' proffered rationales for Proposition 8. An initiative measure adopted by the voters deserves great respect. The considered views and opinions of even the most highly qualified scholars and experts seldom outweigh the determination of the voters. When challenged, however, the voters' determinations must find at least some support in evidence. This is especially so when those determinations enact into law classifications of persons. Conjecture, speculation, and fears are not enough. Still less will the moral disapprobation of a group or class of citizens suffice, no matter how large the majority that shares that view. The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval. As such, Proposition 8 is beyond the constitutional reach of the voters or their representatives."*

Selected Excerpts of the Opinion Relative to "Conclusions of Law"

With regard to Due Process:

1. The Supreme Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry.

2. Marriage has been transformed from a male-dominated institution to one recognizing men and women as equals. Yet individuals retained the right to marry; that right did not become different simply because the institution of marriage became compatible with gender equality.

3. The evidence did not show any historical purpose for excluding same-sex couples from marriage, as states have never required spouses to procreate. Rather, the exclusion exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed.

4. Relative gender composition aside, same-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage under California law.

5. Plaintiffs do not seek recognition of a new right. To characterize plaintiffs' objective as "the right to same-sex marriage" would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy – namely, marriage. Rather, plaintiffs ask California to recognize their relationships for what they are: marriages.

6. By offering the alternative designation "domestic partnership," California communicates the "official view that same-sex couples' committed relations are of lesser stature than the comparable relationships of opposite-sex couples."

7. Proposition 8 is unconstitutional because it denies plaintiffs a fundamental right without a legitimate (much less compelling) reason.

With regard to Equal Protection:

1. No evidence at trial illuminated distinctions among lesbians, gay men, and heterosexuals amounting to "real and undeniable differences" that the government might need to take into account in legislating.

2. All classifications based on sexual orientation appear suspect; California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation. Here, however, strict scrutiny is unnecessary. Proposition 8 fails to survive even rational basis review.

3. California has eliminated all legally-mandated gender roles except the requirement that a marriage consist of one man and one woman. Proposition 8 thus enshrines in the California Constitution a gender restriction that the evidence shows to be nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life.



**For more information about
Family Fellowship write to:
879 East 400 South
Orem, UT 84097
Phone: (801) 225-8437
<http://ldsfamilyfellowship.org>**

Noteworthy

Family Fellowship Forum

**Sunday, November 7 at 5:00 p.m.
Sorenson Unity Center Auditorium
1383 South 900 West
Salt Lake City, UT**

Our speaker will be Brandie Balken, Executive Director of Equality Utah. The title of her presentation is "Non-Discrimination Ordinances in the State of Utah: An Update."



Do They Miss Us?

Sometimes I wonder
Do they miss us
In the chapel on Sundays?
Our voices
Mingling with their voices
Singing hymns as one?

Do they feel
How we were wretched
Out of their guts
When they sent us
On our way
Alone and in pain?

Do they miss
The furtive corner of human desire
Carved in our hearts
Conveyed through our eyes
That was always part of the whole
Now gone missing?

And when they look in our eyes
Do they know
Somewhere in their hearts
That we are theirs
Longing to be embraced
Back into the congregation?

We harden and grow apart
Strange lands are now
Almost familiar to us
But exile is temporary
There is no home, nor rest
If they miss us.

Craig Watts
August 11, 2010