

## **Lesbians and Gays Finally Have the Right to Marry Faith in Reason Returns**

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Today was a very big day for gays and lesbians and Americans, in general. And I've been out celebrating at a rally in West Hollywood at which the Prop<sup>1</sup> 8 plaintiffs' lawyers, David Boies and Ted Olson appeared. So it's late, and I hope what I say here is coherent and conveys my sense of joy and pride in our judicial system – when it's working, as it just has. A federal judge in California who heard the case, brought by two same-sex couples against Prop 8, ruled it unconstitutional under both the Due Process and the Equal Protection clauses of the U.S. Constitution. The way Judge Vaughn Walker saw it, Prop 8 amended the California Constitution to codify distinct and unique roles for men and women in marriage. The “traditional family” that the pro 8 ers promote consists of a married mother and father, both biologically related to their children where the mother stays at home and the father is the bread winner.

Addressing how Prop 8 deprives gays and lesbians of Due Process, the judge stated flat out that the freedom to marry is recognized as a fundamental right protected by the Constitution. To get to that conclusion, he inquired into whether the right is rooted “in our Nation’s history, legal traditions, and practices.” The answer: It is. And he went on to note that the state has never expressed an interest “in procreative capacity or intent before issuing a marriage license.” As for the race restrictions that once existed, he observed that the Supreme Court recognized that barring a man and a woman of different races from marrying stood “in stark contrast to the concepts of liberty and choice inherent in the right to marry.”

To me, given my lifelong commitment to equal rights for women, the fact that Judge Walker spent so much time in his 136-page opinion on gender inequality was heartwarming. As he put it, “women’s legal and economic identity were subsumed by her husband’s upon marriage”, but “this once-unquestioned aspect of marriage now is regarded as antithetical to the notion of marriage as a union of equals.” And his point: Marriage was thus transformed from a male-dominated institution into an institution recognizing men and women as equals....” Judge Walker observed that “the movement of marriage away from a gendered institution and toward an institution free from state-mandated gender roles reflects an evolution in the understanding of gender rather than a change in marriage.”

The judge, turning to the issue at hand -- that marriage has not been open to same-sex couples – declared that one of the many reasons for this “tradition of exclusion” was the traditional difference in gender roles, as well as social disapproval of same-sex relationships. The exclusion of same-sex couples from marriage “exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time, stated Judge Walker, “has passed.” “[M]arriage under law is a union of equals.”

Judge Walker noted “that the [fact that the] majority of California voters supported Prop 8 is irrelevant, as “fundamental rights may not be submitted to a vote; they depend on the outcome of

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<sup>1</sup> I am using “Prop” instead of “Proposition” throughout both because that’s how it’s known and also for brevity.

no elections.” As I have written here before, I and others like me refuse, as members of a minority group, to be subjected to the tyranny of the majority.

Moving on from Due Process to Equal Protection, he noted that Prop 8 discriminates both on the basis of sex and on the basis of sexual orientation. For decades now, discrimination on the basis of sex has been ruled unconstitutional. But this is the first time that I’ve seen the connection between sex and sexual orientation discrimination so clearly laid out. Prop 8, the judge here said, restricts a female plaintiff’s choice of marital partner because of her sex and also operates to restrict her choice of marital partner because of her sexual orientation.... (The same holds for the male plaintiffs.) Sex and sexual orientation are necessarily interrelated, as an individual’s choice of romantic or intimate partner based on sex is a large part of what defines an individual’s sexual orientation. “Sexual orientation discrimination is thus a phenomenon distinct from, but related to, (already unconstitutional) sex discrimination.”

And, finally, Judge Walker decided that “the Equal Protection Clause renders Prop 8 unconstitutional under any standard of review.... Although Prop 8 fails to possess even a rational basis, the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect.” He continued: “All classifications based on sexual orientation appear suspect, as the evidence shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation.... Here... Prop 8 fails to survive even rational basis review.” Judge Walker walks us through all the possible arguments for upholding Prop 8 (for example, promoting opposite-sex parenting over same-sex parenting, but then proceeds carefully and swiftly to knock each down and finally delivers the coup de grace: “[P]roponents ... have failed to identify any rational basis Prop 8 could conceivably advance.... Prop 8 simply conflicts with the guarantee of the Fourteenth Amendment and violates the Equal Protection Clause because it does not treat ‘opposite-sex and same-sex couples’ equally.”

Moving on towards his conclusion, Judge Walker observes that “Prop 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.” He continues: “The evidence at trial regarding the campaign to pass Prop 8 uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples.... Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians.”

And, finally, “[b]ecause California has no interest in discriminating against gay men and lesbians, and because Prop 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.”

This decision feels like a personal victory for me. I’m in a same-sex marriage, and, all along, I’ve been predicting that, once Prop 8 was examined (and ruled on) by a federal court, we had to win. I’ve experienced set-backs, gender discrimination throughout much of my life, not to mention discrimination based on my sexual orientation, especially the fact that my marriage is not granted the respect it deserves by the federal government. But this – Prop 8 – has been like a nasty flu that

keeps coming back from season to season. I'm sure now that once this case is appealed to the 9<sup>th</sup> Circuit we'll win again. I can't say that I'm certain that the Supreme Court will take this case should it get that far, but, if it does, I have a feeling we might even win there. How could Justice Kennedy who wrote the majority opinion in *Lawrence v. Texas*, upholding the right to engage in same-sex sex, not approve of same-sex marriage where such sexual relations would be most properly conducted?! Meanwhile the DOMA case is on its way up there, as well. These are exciting times. Even I never thought all this would happen so quickly and clearly. This extraordinary ruling has given me more faith in the power of reason and fairness.

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