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Proposition 8 Ruling: Be Careful What You Wish For

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Memory, Meaning & Faith

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On August 4, a federal judge in California declared that Proposition 8, an amendment to the California Constitution that defined marriage as between a man and a woman, violated the U.S. Constitution. This ruling, reversing the will of the people of California on a fundamental moral social question, is a disaster for gay rights, as well as for civil rights generally. The court's reasoning is, in my view, ill-informed, ahistorical, and violative of basic constitutional norms. Beyond this, the ruling includes a highly provocative attack on religious beliefs and the people that hold them. Such a blatant act of judicial activist legislation has, in my opinion, very little chance of being upheld by the current, conservative U.S. Supreme Court. But in the meantime, it will provoke a conservative backlash against not only gay rights, but against the constitutional rights of minorities generally.

Judge Vaughn Walker struck Proposition 8 down on two separate grounds under the U.S. Constitution, the due process and equal protection clauses of the Fourteenth Amendment. These clauses are often invoked in civil rights cases, but Judge Walker applied them in a manner without precedent in existing federal law.

Due Process

Consider the Judge's use of the due process clause. Yes, the U.S. Supreme Court has previously held that marriage is a fundamental right, and that it must be protected against undue state interference. But what is marriage? There are two places one can look to answer that question, California law, or federal law. California law is clear enough on this point. The California constitution, due to the effect of Proposition 8, defined marriage as between a man and a woman. The only other place Judge Walker could look was to federal law.

The federal constitution itself is silent on marriage. Family matters and relationships are generally understood as being questions of state law. Still, the federal government has to deal with marriage for certain purposes, such as tax and immigration issues. Congress itself has recently spoken to the issue. In the Defense of Marriage Act, passed in 1996, it declared that for federal purposes, marriage means "only a legal union between one man and one woman as husband and wife."

Still, some may insist that a federal judge should not be bound by a legislative definition of marriage that may invade some constitutional right. But again, neither the Supreme Court, nor any other federal circuit court has ruled that marriage includes same sex couples. To the contrary, the Supreme Court has declared that neither sexual orientation nor homosexual activity as a category is a protected constitutional class. These rulings undermine Judge Walker's position that gay relationships are part of the fundamental right of marriage.

New Definition Of Marriage

So, in the face of contrary rulings by both Congress and the U.S. Supreme Court, Judge Walker essentially created or made up a novel and new definition of marriage. "Walker's marriage," as we might call it, is between any two consenting persons who agree to cohabit and support each other. How Judge Walker decided on the number two is entirely mysterious and unclear.

There is a far greater tradition, in both America and abroad, for polygamous marriage then there is for same-sex marriage.

Since Walker created the right, however, he can make it what he desires. So in stentorian tones, he declared that "gender no longer forms an essential part of marriage." The problem is, a court ruling creates principles that others must follow in some coherent way. Though he did not address it, and may not even realize it, Walker's reasoning would protect equally same-sex marriages, polygamous marriages, group marriages, and incestuous marriages (at least as long as one partner is infertile).

Equal Protection

Walker's treatment of the equal protection clause was no less cavalier. He seemed to want to treat sexual orientation as at least an intermediate suspect class, deserving of the second highest kind of protection under the constitution. The problem is that the Supreme Court has definitively ruled that sexual orientation is not an intermediate class, but only gets the lowest level of protection and review. Walker eventually retreated a bit and applied the rational basis test, the lowest protection available.

To pass this test, a law must reasonably relate to some legitimate legislative purpose. Judge Walker, however, found that protecting traditional marriage had no rational basis whatsoever. Now, granted, all reports are that the private legal team defending the statute made some unusual strategic decisions in this case. The defense limited their affirmative case to only two witnesses, to rebut the plaintiffs' fifteen or so witnesses. Because of this, the factual record for the defense was thin. But even with this sparse record, to hold that there is no rational social basis to limit marriage to a man and a woman is, well, irrational and absurd.

To not see the basis of marriage as being the biological functions of the sexes is to close one's eyes and mind to the most fundamental and obvious distinctions of biology, society, and, human nature. It is to say that societies and cultures, in the central organizing feature of their social frameworks—providing children with a mother and a father—in recorded history have all been irrational and unreasonable. All except, of course, for Judge Walker and his twenty-first century, post-modern friends.

Such a result could really have only been achieved by claiming to apply the rational basis test, but in effect applying at least the intermediate standard of scrutiny used in gender cases, and possibly even the strict scrutiny standard for the most protected classes. I believe that the U.S. Supreme Court will see Judge Walker's legal sleight of hand for what it is, and reverse him.

The Consequences

In the interim, though, the ruling will provoke a tidal wave of right-wing political activism that could well set the gay-rights movement back a generation. This ruling is perceived by many on the right as a direct judicial assault on the deeply felt moral order of society. Consider that gay marriage has never survived a direct vote of the American people, despite attempts in thirty-one states, including very liberal states like California and Maine.

Further, Judge Walker's language itself attacks religious beliefs in a manner that many religious Americans will find threatening and alarming. In his finding of fact number 77, he holds that: "religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians." This legal finding that religious beliefs are dangerous is a prelude to government targeting and censoring of those religious beliefs. This is not mere speculation, as we only have to look north of our border to Canada to see instances of pastors being prosecuted by the state for speaking and writing on the topic of the Bible's teaching regarding homosexuality.

In the face of this threat to their basic belief system, many Bible-believing Christians will appropriately feel the need to politically defend themselves and their communities from this legal intolerance. Such steps need to be taken, in my opinion, by thoughtful Christians who desire to preserve their freedom and that of Christian schools to teach their children the moral standards of the Bible. I fear, however, that the coming backlash will often not distinguish between modern, liberal, judicially-created rights with no basis in either constitutional text or tradition, like gay marriage and abortion, and long established civil rights that are a vital part of ordered liberty, such as freedom of speech, religion, and the separation of church and state. Ultimately, the fervor to reign in libertinism could well threaten liberty itself.

Ordered Liberty

Beginning with the upcoming elections in November—and probably for years to come—the gay-rights community will learn deeply the truth of the old proverb, be careful what you wish for. Meanwhile, those of us who value our Protestant heritage of ordered liberty will want to point out where appropriate regulation of civil morality ends, and where the inappropriate intrusion into private and religious morality begins. Considerations of prudence and privacy militate against making homosexual behavior a crime and may even provide some basis for non-discrimination protections for gays in secular workplaces. But protecting marriage and the privilege of raising children for heterosexual couples makes all kinds of secular, civil, moral sense.

The Adventist church has a distinguished tradition of effectively negotiating the political arena on issues of civil versus private and religious morality. Our pioneers promoted activism and laws to oppose the civil moral evils of slavery and alcohol. At the same time, they publicly opposed attempts to pass laws regarding issues of religious morality, such as Sunday blue-laws and state-sponsored religious observances. We need to draw on this balanced heritage and help our Christian friends understand the fine balance between privacy, morality, and religion in our Protestant heritage of ordered liberty.

Posted by Nicholas Miller on August 13, 2010 in Church and Society | Permalink
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professor, thanks for the article, even though some American legal issues I still did not understand. The question I have is about your last paragraph, which I commented on your last post. How the church can balance their negotiation in the political arena? You mention the fight of law opposing alcohol, but against laws of sunday. Is not this a contradiction...someone can acuse us of pick and choose and not defenders of liberty. What do you think about it?

Posted by: Rodrigo Galiza | August 14, 2010 at 02:19 PM
I have an unshakable belief in the biblical model of the family. That said, I am not convinced that the Seventh Day Adventist church should join in with other Christians to support proposition 8. As I have studied the issue of gay marriage I have come to the conclusion that my opposition to gay marriage is rooted in religious belief and conviction. Outside of that belief I have no rational basis to oppose gay marriage. States have offered the following reasons why marriage should be between a man and woman only: marriage is for procreation. Second, marriage provides the most stable arrangement for the rearing of children. Finally, there is the need to preserve scarce State resources.

These arguments are seriously flawed. First we do not preclude non-child bearing couples from marrying. Second we do prohibit the unmarried from having children. Finally, the fact that allowing same-sex partners to marry will increase the financial burden on the States is not a reason to prohibit gay marriage. It is not surprising that there are Judges who have found the foregoing reasons irrational.

We now face a significant challenge. Gay marriage is a serious threat to religious freedom. How will gay marriage impact the interpretation of our non-discrimination laws. In fact, we can than Justice Scalia for the challenges to religious freedom because of his decision in the Smith case. Catholic Family Charities has closed up shop in every jurisdiction where gay marriage has become the law. Time will tell how gay marriage impacts the Adventist Church's institions.

How should we respond? Should we utilize the power of the State to fight the gay marriage movement or the power of the gospel. The first reality that we must confront is the fact the the Christian Church on a whole is divided over this issue. As Christians we should resolve this issue as a movement before we confront the secular society. I firmly believe that the Adventist movement is based upon the call to reform and where that reform fails, then we must separate. We must not fall to the lure to use the State to impose our sincerly held religious convictions.

The Sabbath and Marriage are the two institutions that we find inaugarated after the creation event. How many of us would join a movement to enforce the Sabbath as the law of the land. I can think of no reason why marriage is any different. We teach and preach the Sabbath. We should do the same for marriage.

These are my thoughts at the present time. I look forward to learn from others on this issue.

Posted by: Jash | August 14, 2010 at 03:00 PM
Thank you Rodrigo and Jash, you both make good points and ask good questions that are sufficiently related for me to answer together. To summarize your point, as I understand it, is that as we would not enforce Sabbath observance, why would we protect traditional marriage through the use of law? Is that not inconsistent, and an imposition of our religious views regarding marriage?

Jash's point about the two institutions is a very good one that I will begin with. These two institutions are based in two separate parts of God's law. The Sabbath command comes from the first table, marriage is found in the second, in a combination of the 5th command (about honoring parents) and the 7th command (forbidding adultery).

The first table regulates our relationship with God, and should not be legislated by man. The second table involves our relationship with each other, and the Bible suggests that it is the proper realm for state oversight (Rom. 13). All governments regulate aspects of the morality described in all the command of the second table, from child delinquency laws, to murder, theft, and perjury laws, to laws relating to marriage and divorce.

An important point here is that governments regulate these matters not because they appear on the second table, but because they are obviously concerned with important issues for society. So these matters are regulated not just in the Christian west, but also in the Islamic middle-east and the Asian far-east, even where the Bible has historically had little or no influence.

I would particularly take issue with Jash claim that there is no reason to be against gay marriage other than religious reasons. There are very clear scientific findings that children do best, socially, emotionally, educationally, when they are raised by a mother and a father. There are elements that both genders bring to child-rearing that complement each other. There are also pathologies that are found in same-sex relationships relating to rates of disease, abuse and instability that are not healthy for child-rearing. These are not "religious" reasons, but are reasons accessible to all who can reason about these things in an informed way.

This is the reason that we were not inconsistent as a church to support liquor laws, but to oppose Sabbath laws. Liquor laws had to do with preventing real harm to society, in terms of children and wives abused, increase of crime, and promotion of unemployment. Sabbath laws have to do with trying to regulate people's relationship with God, which is off limits for the state. In my opinion, laws protecting traditional marriage and its role in the raising of children are like the liquor laws, and not like the Sabbath laws.

Nick

Posted by: Nicholas Miller | August 16, 2010 at 04:49 PM
I agree that laws that prohibit danger to children, those the prevent disease and abuse are good laws. I also agree that laws that prohibit alcohol creating abuse among people are also good. The State in that event is very helpful to guide those whose beliefs are not religiously savvy but need further study. As well, I am glad to see Mormons taxed in Proposition 8, as they should be. There should be no free lunch for people who seek power and protection as well as a free lunch under religious laws, as a means of hiding from laws and the same applicable laws that apply to all other types and groups of people on the planet, since mormons ceate a huge population on the planet to use its resources.

Posted by: valerie | September 06, 2010 at 08:58 PM

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