# Homosexual Judge Overturns Prop 8 Through Lousy Reasoning

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**On August 4, 2010, homosexual Judge Vaughn Walker overturned the express will of 7,000,000 Californians when he declared their ballot initiative, Proposition 8, unconstitutional.** Matthew Franck writing on *Public Discourse* http://www.thepublicdiscourse.com/2010/08/1490 has described Judge Walker's decision as "wholly fallacious," the "nadir of absurdity," and "the worst sophistical knavery that has been seen in quite some time in the pages of American jurisprudence."

What may be the most troubling aspect of this deeply troubling case is that Judge Walker should never even have allowed this legal challenge to Proposition 8 to go to trial. Attorney Janet LaRue writes that in *Baker v. Nelson* [1972], "the Supreme Court rejected a constitutional challenge to a state law limiting marriage to one man and one woman….for want of a substantial federal question." *Baker v. Nelson* is binding on all lower courts as Justice Joyce Kennard acknowledged in another same-sex marriage case, *Lockyer v. San Francisco*:

> [I]ndeed, there is a decision of the United States Supreme Court, binding on *all* other courts and public officials, that a state law restricting marriage to opposite-sex couples *does not violate the federal Constitution's guarantees of equal protection and due process*.… Until the United States Supreme Court says otherwise, which it has not yet done, *Baker v. Nelson* defines federal constitutional law on the question of whether a state may deny same-sex couples the right to marry (emphasis added).
> http://townhall.com/columnists/JanetMLaRue/2010/08/13/marriage_judge_is_on_shaky_ground

Chris Wallace, host of *Fox News Sunday*, interviewed http://www.foxnews.com/on-air/fox-news-sunday/#/v/4305716/ted-olson-on-fns/?playlist_id=86913 purported conservative Ted Olson, one of the attorneys who led the charge against traditional marriage. Olson had some remarkably specious things to say about marriage. (Olson's comments are in red; my responses are in black):

- "That's why we have an independent judiciary. We do not put the Bill of Rights to a vote."
  This statement presumes something rather astonishing: it presumes that somewhere in the penumbra formed by emanations in the Bill of Rights exists a right for men to marry men and women to marry women.
- "Forty-one states once prohibited interracial marriages."
  Comparing same sex marriage to interracial marriage requires prior assent to the proposition that homosexuality is a state or condition similar in fundamental ways to race. But that is a false proposition, one with which many blacks disagree; one with which many theologians disagree; one with which "queer theorists" disagree; and one with which no scientist would agree.

Laws banning interracial marriages were based on a deeply flawed understanding of both race and human nature. They were based on a false belief that different races were of fundamentally different natures. As Dennis Prager explains:

> There are enormous differences between men and women, but there are no differences between people of different races. Men and women are inherently different, but blacks and whites (and yellows and browns) are inherently the same. Therefore, any imposed separation by race can never be moral or even rational; on the other hand, separation by sex can be both morally desirable and rational. Separate bathrooms for men and women is (sic) moral and rational; separate bathrooms for blacks and whites is (sic) not. . . . a black man's nature is not different from that of a white man, an Asian man, an Hispanic man. The same is not true of sex differences. Males and females are inherently different from one another.

Laws banning interracial marriages were based on the erroneous belief that whites and blacks are by nature different, when, in fact, whites and blacks are *not* by nature different. Laws that permit only heterosexual marriages are based on the true belief that men and women are by nature different. Therefore, it is permissible and right for laws that regulate marriage to take into account the very real differences between men and women.

Moreover, Thomas Sowell, senior fellow at Stanford University's Hoover Institution, explains that "The argument that current marriage laws 'discriminate' against homosexuals confuses discrimination against people with making distinctions among different kinds of behavior. All laws distinguish among different kinds of behavior."

A black man who wants to marry a white woman is seeking to do the same action that a white man who wants to marry a white woman seeks to do. A law that prohibits an interracial marriage is wrong because it is based on who the person *is*, not on what he seeks to do.

But, if a man wants to marry a man, he is seeking to do an entirely different action from that which a man who wants to marry a woman seeks to do. A law that prohibits homosexual marriage is legitimate because it is based not on who the person *is* but rather on what he seeks to *do*.

Neither homosexual men nor heterosexual men can marry men. Both homosexual men and heterosexual men can marry women. Homosexual men are not denied the right to participate in the unique institution of marriage. They are choosing not to exercise their right.

- "Since 1888, the Supreme Court has fourteen times decided and articulated that the right to marriage is a fundamental right."

  He fails to acknowledge that these prior findings assumed the fundamental right was to participate in a particular institution—not to change the institution. The prior court decisions presumed a sexually complementary institution, which is not created but recognized.

  Every adult has the legal right to marry. Homosexuals are not demanding a civil right that is denied them based on a universal, objective human characteristic; they are being denied the right to redefine the *institution* of marriage by eliminating one of the criteria that society has deemed essential: sexual complementarity.

  Homosexuals as individuals are not being denied the right to marry. They are being denied the right *to choose the sex of their marriage partner.* Others are denied the right to choose the numbers of their partners. Still others are denied the right to choose the age of their partner. And yet others are denied the right to choose the blood proximity of their partner.

Polyamorous people who love more than one person cannot redefine marriage by eliminating the criterion of numbers of partners. Incestuous couples cannot redefine marriage by eliminating the criterion regarding close blood kinship. And pedophiles cannot eliminate the criterion of minimum age. None of these groups of people are being denied their civil rights even though they cannot marry whom they'd like to marry. They are being prevented from unilaterally redefining marriage which is a public institution that affects the public good.

- "We're talking about whether a fundamental right…can be deprived of certain individuals because of the color of their skin or their sexual orientation."

Here Olson engages in category confusion. There are very broadly two categories of conditions:

First, there are conditions that have no behavioral implications that can be assessed morally. In other words, these conditions are morally neutral, like skin color or biological sex. Having brown skin has no behavioral and, therefore, no moral, implications.

And then there is the second category of conditions, which includes conditions that are centrally defined by desire or feelings and volitional behaviors. This would include polyamory (which is the romantic and sexual attraction to and involvement with multiple people at the same time), promiscuity, consensual incest, aggression, and homosexuality. The initial impulses or desires may be shaped by biological factors, but the behaviors associated with these conditions are volitional and legitimate objects of moral assessment.

"Progressives" are plucking homosexuality out of category 2 and treating it like conditions from category 1 without any justification for doing so and apparently hoping no one will notice or challenge them.

But homosexuality is not analogous to race. Race or skin color is 100% heritable; completely immutable; and has no behavioral manifestations that are legitimate to assess morally.

- "The Supreme Court has said that marriage, the right to marry a person of your choice, is a part of liberty, privacy, association, and spirituality guaranteed under the Constitution."

Nowhere in the text of the Constitution or the history of its interpretation has it been understood to say that it guarantees the right of every person to marry the person of his or her choice without qualification.

- "It is extraordinarily damaging to our citizens, our family members, our brothers, our sisters, our co-workers, and our neighbors when they are labeled second-class citizens. When the state of California, as it did in this case, enshrined in its Constitution a separate status for certain of its citizens, it did immeasurable harm. We can't wait for the voters to decide that that immeasurable harm that is unconstitutional must finally be eliminated."

According to "conservative" attorney Ted Olson, his unproven, non-factual judgment that homosexual practice is moral trumps the judgment of 7,000,000 Californians that it's not. And according to moral expert Ted Olson, long-held, cross-cultural moral assumptions about volitional conduct are both unconstitutional and harmful.

The logical extension of his principle here would mean that any behavior (e.g. gossip, promiscuity, or polyamory) that society deems immoral would damage family members, brothers, sisters, co-workers and neighbors who engage in that behavior by labeling them "second-class citizens."

- "All we have to do is look into the eyes of these individuals and decide why are we denying them the right to happiness that we afford to all of our other citizens."

Someone better keep ethicist Olson from gazing into the eyes of polyamorists and ephebophiles. I fear what he might pursue once he realizes that we deny polyamorists and ephebophiles "the right to happiness that we afford to all our other citizens."

Judge Walker had some equally specious things to say https://ecf.cand.uscourts.gov/cand/09cv2292/files/09cv2292-ORDER.pdf about the case in both his "findings of fact" and his conclusion. His findings of facts can only be construed as facts by those who don't know what a fact actually is.

Here are just a few of the facts he found (Judge Walker's statements are in red; my responses are in black):

- "Sexual orientation is fundamental to a person's identity."

  This simply cannot be a statement of fact in that what constitutes "identity" and what would be imputed to be fundamental to identity are philosophical questions, not factual questions. This is not a factual statement; it is a philosophical proposition. In addition, the term "sexual orientation" is a recent rhetorical invention that embodies the ideas of biological determinism, immutability, and moral neutrality and is intended to persuade an unwitting public that sexual desire and volitional sex acts are akin to race.

- "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."

  Apparently, Judge Walker is unaware of the research of, for instance, Stanton L. Jones and Mark A. Yarhouse which can be found in their book, *Ex-Gays: A Longitudinal Study of Religiously Mediated Change in Sexual Orientation*.

- "Same-sex couples are *identical* to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions."

  How did societies around the world and throughout history not notice this objective "fact"? How is "success" defined? Which characteristics are "relevant to the ability to form successful marital unions"? Who has established the factual status of the characteristics that Judge Walker deems relevant? I would argue that sexual complementarity is not only relevant but essential to marital unions—successful or otherwise. For a union to be a *marital* union requires heterosexual intercourse.

- "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."

  Apparently Judge Walker has not read the work of Stanley Kurtz who has written about the decline of heterosexual marriages in Scandinavia that correlates with the legalization of same-sex unions. Once marriage is severed from procreation and childrearing, and once marriage is separated from gender, it becomes meaningless as a public institution.

- "Proposition 8 places the force of law behind *stigmas* against gays and lesbians."

  Assumptions about what constitutes moral behavior are rarely thought to be "stigmas." Would Judge Walker consider moral disapproval of polyamory to be a stigma?

- "Proposition 8 eliminates the right to marry for gays and lesbians but does not affect any other substantive right under the California Constitution."

  By adding the word "other," Walker implies that the right to marry someone of the same sex is a substantive right under the California Constitution, which is a fallacious claim.

- “CCSF [The City and County of San Francisco] would benefit economically if Proposition 8 were not in effect. CCSF would benefit immediately from increased wedding revenue and associated expenditures.”

  Although this may be true, it is not a moral argument in favor of radically redefining marriage. The same claim could be made about the legalization of polygamy. One wonders if Judge Walker would conclude that economic incentives should compel society to legalize polygamy.

- “Proposition 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.”

  First, in what sense is this a finding of fact?

  Second, consistency would require that Judge Walker hold that the legal prohibition of polygamy singles out polygamists and legitimates their unequal treatment. Banning polygamy perpetuates the stereotype that polygamists are incapable of forming long-term loving relationships and that polygamists are not good parents.

  Third, how specifically does the definition of marriage as a sexually complementary institution “perpetuate the stereotype that gays and lesbians are incapable of forming long-term loving relationships”? Judge Walker’s demagogic language betrays his claim that these are findings of fact. Moral beliefs with which he disagrees are “stigmas” and “stereotypes.”

- “Proposition 8 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.”

  Here is what is fascinating about Judge Walker’s “findings of fact”: He merely acknowledges that some people have a subjective emotional experience and deems that a finding of fact. He acknowledges that homosexuals *feel* that society doesn’t value their relationships as much as heterosexual relationships and that becomes a “finding of fact.”

- “The factors that affect whether a child is well-adjusted are: (1) the quality of a child’s relationship with his or her parents; (2) the quality of the relationship between a child’s parents or significant adults in the child’s life; and (3) the availability of economic and social resources.”

  Is Judge Walker asserting that these are the *only* factors that affect a child’s adjustment? If so, then Judge Walker must heartily endorse legalized marriages between mothers and sons, or homosexual siblings, or five people of assorted genders, because they too must be capable of loving each other and their children and of providing sufficient economic and “social” resources.

- “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.”

  This is decidedly *not* a statement of fact. There are few longitudinal studies of children raised by homosexuals and the few studies that do exist about homosexual parenting have been criticized for numerous reasons, including methodological flaws.

  In addition, it seems that the volumes of research that reveal that children fare best when raised by both a mother and a father provide evidence that “the gender of a child’s parents” is, indeed, a factor—indeed, an important factor—in a child’s adjustment.

If gender *is* irrelevant, what does Judge Walker make of President Obama's Father's Day proclamation in which he said,

> From the first moments of life, the bond forged between a father and a child is sacred. Whether patching scraped knees or helping with homework, dads bring joy, instill values, and introduce wonders into the lives of their children…. Fathers are our first teachers and coaches, mentors and role models. They push us to succeed, encourage us when we are struggling, and offer unconditional care and support. Children and adults alike look up to them and learn from their example and perspective. The journey of fatherhood is…an opportunity to model who we want our sons and daughters to become, and to build the foundation upon which they can achieve their dreams….Fatherhood also carries enormous responsibilities. An active, committed father makes a lasting difference in the life of a child. When fathers are not present, their children and families cope with an absence government cannot fill.

- "Gays and lesbians have been victims of a long history of discrimination."

  Here Walker again engages in category confusion. He is conflating or blurring the distinction between two meanings of discrimination. An important distinction must be made between appropriate or ethical discrimination and unethical discrimination. Discrimination can refer to making judgments, distinguishing, or discriminating between right and wrong in which case it is a good, healthy, and essential personal and civic process.

  Illegitimate discrimination, on the other hand, refers to unfavorable treatment of others based on ignorance. Conflating or deliberately obscuring the different meanings of discrimination, or asserting that all negative judgments reflect discrimination, plays on our country's racial guilt and people's understandable resistance to being associated with such ugliness.

  It is true that homosexuality has long been viewed as immoral.

- "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 intimate 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."

  First, what is the relevance of "well-known stereotypes about gay men and lesbians"? Stereotypes abound about virtually every group and sub-group into which humans divide themselves. Humans naturally classify and categorize people and things into groups according to shared and recognizable traits. Some of our most popular films and television programs appeal to audiences precisely because they reflect stereotypes that emerge from real, recognizable, and familiar stereotypes. For example, the films *My Big, Fat, Greek Wedding; Moonstruck*; and *The Birdcage* appealed to audiences because they depicted stereotypes. And stereotypes of gay men and lesbians delighted even the homosexual audience of the television program *Will and Grace*.

  Second, the CDC "finds that the rate of new HIV diagnoses among men who have sex with men (MSM) is more than 44 times that of other men and….The rate of primary and secondary syphilis among MSM is more than 46 times that of other men." (Does that provide sufficient evidence for the claim—or in Judge Walker's view, "stereotype"—that homosexual men are more likely to suffer from sexually transmitted infections?)

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

  What constitutes harm to Judge Walker? Does he apply his principle for determining harm consistently? Do religious beliefs or non-religious beliefs that polyamorous relationships or consensual incestuous relationships are

sinful or inferior to heterosexual relationships harm polyamorists or those who are romantically and sexually involved with their siblings?

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

Here's part of the evidence Walker provided for this finding of fact:

> The campaign television and print ads focused on protecting children and the concern that people of faith and religious groups would somehow be harmed by the recognition of gay marriage. The campaign conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure to gay people and their relationships. The most striking image is of the little girl who comes in to tell her mom that she learned that a princess can marry a princess, which strongly echoes the idea that mere exposure to gay people and their relationships is going to lead a generation of young people to become gay, which voters are to understand as undesirable. The campaign conveyed a message used in earlier campaigns that when gay people seek any recognition this is an imposition on other people rather than simply an extension of civil rights to gay people.

How does Walker arrive at the conclusion that an image of a little girl telling her mom that she learned that a princess can marry a princess echoes the "idea that mere exposure to gay people and their relationships is going to lead to a generation of young people to become gay"? Walker's leaps of illogic are remarkable. Did he entertain the possibility that such an image might lead instead to children accepting an unproven, non-factual moral assumption that homosexuality is morally equivalent to heterosexuality—an assumption that many reject as utterly fallacious?

Again, to Walker, all moral assumptions with which he disagrees are "stereotypes" that society must reject and replace in law with his moral assumptions, which are, in reality, nothing more than alternative "stereotypes."

Judge Walker's radical, subversive, a-historical conclusion includes the following outlandish statements:

- "The right to marry has been historically and remains *the right to choose a spouse* (emphasis added) and, with mutual consent, join together and form a household."

There has never existed an absolute, unfettered right to choose a spouse. I can't choose to marry my mother, or two boyfriends, or a fourteen-year-old paramour.

- "Gender no longer forms an essential part of marriage."

Matthew Franck shreds this conclusion:

> Judge Walker seems to have committed the fallacy of composition—taking something true of a part and concluding that it is also true of the whole of which it is a part. If it is true that "gender" no longer matters as it once did in the *relation* of husband and wife, he reasons, therefore it no longer matters whether the relation *is one of* husband and wife; it may as well be a relation of husband and husband or of wife and wife, since we now know that marriage is not, at its "core," a "gendered institution." But restated in this way, it is quite plain that the judge's conclusion doesn't follow from his premises. To say that the status of men and women in marriage is one of *equal partners* is not to say that men and women are the *same*, such that it does not matter what sex their partners are. The equalization of *status* is not the obliteration of *difference*, as much as Judge Walker would like to pretend it is.

- "Plaintiffs' unions encompass the historical purpose and form of marriage…. 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."

  Plaintiffs are, indeed, seeking something different from what opposite-sex couples are seeking: they are seeking to marry someone of the same sex. They are seeking to jettison one of the four central defining characteristics of marriage. And they are seeking to compel society to recognize their relationships as something they are objectively not: marriages.

- "Plaintiffs challenge Proposition 8 as violating the Equal Protection Clause because Proposition 8 discriminates… on the basis of sex….Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage."

  This argument could be made for any rational distinctions made on the basis of sex differences. For example, I could make the argument that I am being discriminated against on the basis of sex because I am prohibited from using a men's restroom while men are permitted to use it.

- "… [E]xcluding same-sex couples from marriage is simply not rationally related to a legitimate state interest…."

  Historically, both in this country and around the world, marriage has been understood to be the union of one man and one woman. Societies recognize, celebrate, and legally sanction this particular relationship because it is the type of relationship in which children will potentially be born and raised. Because procreation and effective parenting are essential for the sustenance and continuance of healthy societies, legal recognition of this type of union is a compelling state interest.

- "[T]he evidence shows beyond debate that allowing same-sex couples to marry has at least a neutral, if not a positive, effect on the institution of marriage…."

  There has been much ink spilled on how the legalization of same-sex "marriage" will negatively impact the institution of marriage. Legalized same-sex marriage severs marriage from procreation and gender which will diminish both its public meaning and the public's investment in it. In addition, many homosexual men do not consider sexual fidelity to be an integral part of marriage. Once institutionalized, their radical conception of marriage will propagate and eventually shape even many heterosexuals' views of marriage—particularly heterosexual men.

- "Proposition 8 harms the state's interest in equality, because it mandates that men and women be treated differently based only on antiquated and discredited notions of gender."

  When homosexuals claim that they prefer only members of their own sex as romantic and sexual partners, they are acknowledging that men and women are fundamentally and significantly different. Many, including experts in the fields of sociology, psychiatry, psychology, theology, and neuroscience, assert that these differences are not exclusively anatomical, but emotional, psychological, and/or spiritual in nature.

  Since men and women are fundamentally and significantly different, unions composed of the same sex must necessarily be of a different nature from unions composed of different sexes, and, therefore, it's reasonable to conclude that each type of union would impact society differently.

Further, society has concluded that the only type of union that truly benefits the public is a union between two unmarried adults of opposite sex who are not closely related by blood. In evaluating the inherent merits of or contributions to the public good that homosexual unions bring, society has concluded that legal recognition is not warranted.

Finally, Prop 8 rests on the notions that men and women are different in fundamental and substantive ways; that together men and women produce children; that because men and women are different, they contribute differently to childrearing; that children have self-evident and inalienable rights, which include whenever possible, the right to be raised by the biological parents who produced them; and that this unique family structure contributes in immeasurable and essential ways to the public good. Are these antiquated and discredited notions?

- "Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples."

Michael Medved refutes this assertion, arguing that public support for legalized heterosexual unions only is based on the following ideas:

> They are more consequential and serve an important social purpose more effectively. Laws in every state recognize the desirability of children being raised by their biological parents, wherever possible. This is based on the universal, commonsense assumption that children generally will fare best if they are raised by both their birth mothers and birth fathers. Laws on divorce, child custody, adoption and foster parenting all codify this general preference for birth parents involving themselves in a child's life. Traditional opposite-sex marriage generally produces a situation where both birth parents will participate in parenting — a shared responsibility that even survives divorce in most cases. There is no chance — none — that a same-sex marriage can produce a child who will be raised by both birth parents. Here in Judge Walker's own words is what's really at stake and what motivates the homosexuality-affirming movement:

Domestic partnerships lack the social meaning associated with marriage….The availability of domestic partnership does not provide gays and lesbians with a status equivalent to marriage because the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships.

Walker and his philosophical compatriots want to exploit the law to compel all of society to treat same-sex unions as having the same social and cultural meaning that heterosexual marriage—that is to say, *real* marriage—does. The National Catholic Bioethics Center harshly critiques this goal:

> The reason, then, for why domestic partnerships are not enough is because alone they fail to create an impression in people's minds ("social meaning") of the moral legitimacy of homosexual sex. In this regard, [Judge Walker's]opinion collapses into a tract aiming to proselytize those in favor of a traditional definition of marriage, and effectively aims to "impose the homosexual agenda" on the rest of society. It is a work in cognitive engineering, an attempt to have homosexual actions gain wider acceptance in society. As such, the Opinion has little to do with the Constitutionality of Prop 8. http://www.ncbcenter.org/NetCommunity/Page.aspx?pid=482&storyid1277=120&ncs1277=3

**Let's hope and pray for clearer heads and better judicial thinking to prevail on appeal. ■**

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