



Written by [Selwyn Duke](#) on May 27, 2009

California's High Court Upholds Proposition 8

In a 6-1 ruling yesterday, the California Supreme Court voted to uphold Proposition 8, which amended the state's constitution so as to define marriage as the union between a man and a woman. This concludes the Golden State court system's adjudication of the proposition; however, a federal suit by a group called the American Foundation for Equal Rights appears to be in the offing.



While the proposition's supporters hailed the decision, quite predictably, its opponents [held protests](#) that led to arrests. Yet it's obvious the latter didn't quite understand what they were protesting. Sure, they would tell you they were there to support same-sex marriage, but what they don't realize is that they're protesting against the rule of law and our system of government as well.

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The media are no help, either. Strongly implying that the court is contradicting itself, Bob Egelko at the San Francisco Chronicle [wrote](#):

In May 2008, a 4-3 majority led by Chief Justice Ronald George said California's voter-approved law that allowed only opposite-sex couples to marry violated the rights of gays and lesbians to choose their spouses and discriminated on the basis of sexual orientation....

But on Tuesday — after an \$85 million campaign that ended Nov. 4 with Prop. 8 winning 52 percent of the vote — George led a majority that declared the right to marry was not essential for gays' and lesbians' equality and that the people were the ultimate deciders of what should be included in their Constitution.

Now, far be it from me to defend California's statist court justices, but it's Egelko and company who are confused. While the state's high court may be contradicting itself — and I have no doubt it has often been thus guilty — it's not for the reason Egelko thinks (or feels). Last year the justices struck down the marriage law stating it was contrary to the state's constitution; however, since Prop. 8 amends the constitution, this can no longer be said. It's no different than when sports referees penalize a player for violating the rules but then allow the same action the next year after the rulebook has been changed. Such a thing is only viewed as contradiction by those who are oblivious to a judge's role.

Just as faux marriage supporters mistake wrong for right, they mistake constitutional for right. They believe it's right to establish faux marriage as a right; thus, they scorn the court for upholding Prop. 8. But it isn't the court's role to do what is "right," as bad as that sounds. It's also true that constitutional is not synonymous with right or moral; if that were the case, we wouldn't need the word "moral." Sure, we should hope that a constitution would be formulated with wisdom so that it mirrors morality. But



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that is the job of the people, either directly as in California or through elected representatives (or perhaps a combination of both). Justices are enjoined to do what is right in only one respect: it is right for them to abide by the will of the people as expressed through the constitution.

Justice George made note of this. Writes Egelko, “‘It is not our role to pass judgment on the wisdom or relative merit’ of the state’s constitutional amendment process, George said in a 136-page opinion. Any further change in the marriage law, he said, ‘must find its expression at the ballot box.’”

In other words, George and his fellow travelers could rationalize sufficiently well to divine a right to faux marriage in their state’s pre-Prop. 8 constitution. But even they understand that to strike down Prop. 8 would be blatant malfeasance, an overt violation of a constitutional provision that, although newly minted, is as valid as any other.

Yet there are those who are content to let judges act as shameless oligarchs, and one of them occupies California’s high court. Reports Egelko, “The lone dissenter, Justice Carlos Moreno, said the court was accepting the same separate-but-equal status for gays and lesbians that it rejected last year.”

Wrong.

The court is simply accepting that it is not its place to act as a ruling elite, contravening the will of the people and making law.

And part of the problem is that individuals such as Moreno become accustomed to certain constitutional norms and then suddenly behave as if the constitution is a quite dead document, rejecting even lawful changes incongruent with their old conception of it. But the people or their representatives can change the “rule book” anytime they please. And there is not a darn thing justices can do about it ... legally.

It also makes no difference that the change is brand new. Every constitutional principle in this nation was created by the people or their representatives at one time or another, and a change is a change is a change. It is the legal way to make the constitution come “alive,” much different than the living-document illegality Moreno and his minions would prefer.

It also should be noted that by passing Proposition 8, Californians did not deny government sanction specifically and solely to faux marriage. Rather, they defined marriage as the union between one man and one woman. This is not even close to mere semantics.

One of the problems with faux marriage supporters is that, frankly, they act like children. They only know what they feel and want at the moment, and at this moment they happen to want homosexuals to be able to pretend to marry. But they lack a vision for the future and for marriage and have little grasp of the consequences of the precedents they set.

What I mean is, they have often been accused of redefining marriage, but this isn’t really true. They would “undefine” it.

The majority that passed Proposition 8 affirmed an age-old, concrete definition of marriage: one man and one woman. This certainly disqualifies same-sex couples, but it does the same to polygamists — and to people who would “marry” a goat (with how some today anthropomorphize animals — sometimes even sending them to pet psychologists and administering anti-depressants — I wouldn’t put it past our everyman Caligulas). But what is the vision of faux-marriage fanatics? They’re throwing a tantrum at the moment as they gnash their teeth and wail about how they want their latest little social innovation rubber-stamped. But they only tell us what marriage is not, not what it is. Yet, if they cannot define precisely what it is, how can they be sure about what it is not?



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In reality, the reasoning they espouse can be used to legitimize polygamy and man/beast “marriages” as well. They scoff at this, implying that their critics are simpletons or irrational fear mongers, but it is they who lack depth. Note that the centerpiece of their argument is not that marriage should be defined as the union of any two adults (this at least would be a vision); no, their tactic of choice is a scream of “equality!” Yet, if you establish this as a precedent, how do you then deny “equality” to other adults who have different tastes in marriage? This is the conclusion to which their own argument inarguably leads.

Thus, when faux marriage fanatics scoff at this legitimate point, they act as if ideas don’t matter; they act as if precedents aren’t precedents. They simply feel that traditionalists’ warnings are nonsense, and that is good enough for them. This is how children behave.

Yet ideas do matter, and a notion’s ridiculousness often fails to stop people from embracing it (as evidenced by faux marriage’s rising star). People did at one time treat the deranged by drilling a hole in their heads so as to release evil spirits that were supposedly dwelling therein (trephining). The Nazis did in fact try to accelerate human evolution in a hothouse environment so as to “recreate” Aryan supermen.” And the Soviets did, amazingly, create the “Institute of the Brain,” [established](#) in part to study Vladimir Lenin’s brain because, by golly, he just must have been a genius non pareil. Thus, the only thing ridiculous is believing that ridiculousness has little acquaintance with policy.

Equally childish is the inability to distinguish between social goals and legal roles. Whatever our agenda, we should understand the difference between constitutional principles and personal ones. We should strive to keep the courts within their very limited role and not place them in the service of our favored social activism. Sure, the left doesn’t mind adventurist courts right now, as judges have been moving left for the last 100 years along with the rest of society. But patterns can change, and, as Mark Levin documented in his book *Men in Black*, the Supreme Court has shown no consistency historically. Moreover, once you empower judges to be de facto oligarchs, can you be sure they won’t trample rights you hold dear? I would remind you, dear liberals, of the *Kelo* eminent domain decision, which was bemoaned by left, right and center. It was delivered courtesy of your good leftist friends in black robes.

Remember, anytime any of us lobby to have judges do our bidding from the bench and ignore a constitution, we are complicit in the undermining of the rule of law. And if tyranny then befalls us, we are only reaping what we have sown.



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