

A Result Looking for a Rationale

By Dean R. Broyles

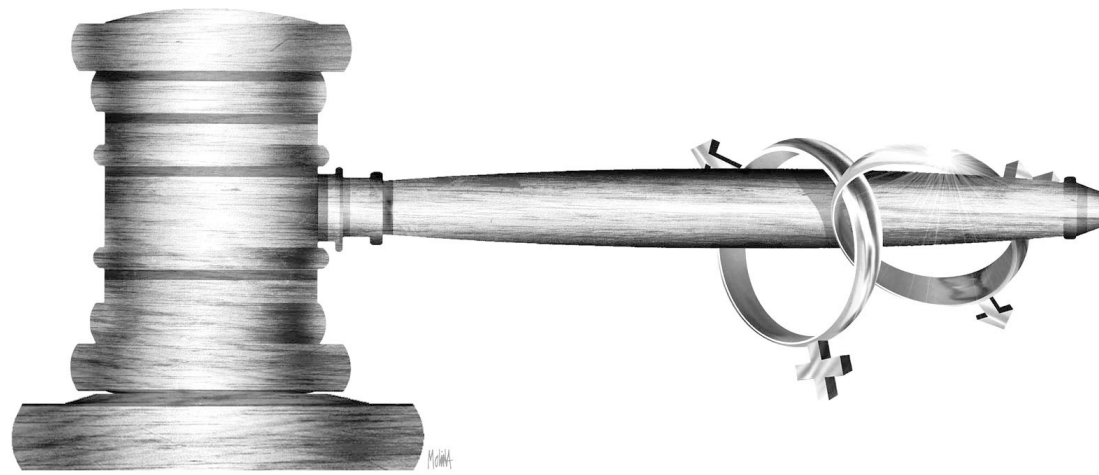
Federal District Court Judge Vaughn Walker's recent legal opinion striking down Proposition 8 and creating a new "constitutional" right to same-sex "marriage" should be rejected by anyone who values the U.S. Constitution, the rule of law, and common sense. In his opinion, and I emphasize "opinion," Walker first creates an unrecognizable post-man and post-woman world and then coercively "invites" us to join him. For the sake of the common good of our beloved country we must decline his invitation.

In his work of legal fiction, Judge Walker repeatedly criticizes Proposition 8 proponents for enacting a constitutional amendment that he asserts is only based on personal religious beliefs. He argues that such "private biases" cannot be tolerated as a basis for public laws. Yet, what is abundantly clear from a careful reading of his opinion is that Walker himself harbors deep philosophical pre-suppositions or "biases" which he barely camouflages and which he shamelessly brings to bear in forming a new constitutional right to same-sex "marriage." Most of his opinion reads more like a series of statements of faith rather than findings of fact.

It is not surprising that Walker is one of a few openly gay judges on the federal bench. What is astonishing is that he was allowed to adjudicate this case. Throughout his opinion it is abundantly clear that, as a homosexual man, he is a staunch supporter of the homosexual legal agenda. As such, Walker, in the interest of justice, should have recused himself and left the judging to a less biased and more objective jurist.

Ironically, Walker criticizes Proposition 8 proponents and California voters for enshrining personal moral (religious) beliefs about human sexuality into the law. His statement is a variation of the belief that "You can't legislate morality." But all legislation reflects morality (or your worldview) on some level. In fact, most of our laws in the United States come from the English Common law, which was based largely on biblical moral principles. Are we to replace our entire legal code? However, the real question is whose morality should public legislation reflect? Here, the two primary options are a thoughtful, reflective, objective Judeo-Christian morality or the selfish, subjective atheist morality of the secular left. As our Founding Fathers acknowledged, the first serves the common good, the second serves itself. When secular humanists repeat this mantra, what they really mean is that they don't want society to legislate a morality to which they personally object, namely a Judeo-Christian morality. Yet, hypocritically, Walker is seen no problem with enshrining into law his personal moral beliefs about human sexuality.

In essence, Walker announces in his opinion that society has "evolved" to a level of consciousness where we must move beyond "archaic" Judeo-Christian notions of morality to a new legal age where only sage atheist judges can guide us to even higher levels of existence. In that sense, it is most fitting that Walker sits on the bench in San Francisco, a center of



1960's social upheaval.

In support of his creation of a new right to same-sex "marriage," Walker buys into several assumptions that defy reality. First, he accepts and embraces the secular humanist myth that gender doesn't matter. To Walker, men and women are the same. However, in so declaring, Walker ignores the obvious, real, meaningful, and scientifically proven differences between men and women.

And having "androgen-ized" men and women into a new genderless species that "Saturday Night Live" cleverly characterized as "Pat," Walker proceeds to announce a series of absurd conclusions. First, because there are no longer any differences between men and women, a so-called "marriage" relationship between two men or two women is no different than the relationship of a man and a woman ("Gender no longer forms an essential part of marriage; marriage is a union of equals.") Second, since gender doesn't effectively exist anymore, moms and dads are meaningless categories for children in the context of the family and are therefore fundamentally unimportant categories for purposes of child rearing ("The [g]ender of a child's parent is not a factor in a child's adjustment," and, "Having both a male and a female parent does not increase the likelihood that a child will be well adjusted.") In Walker's world, despite social science evidence to the contrary, it does not matter a whit whether a child has a father and mother. Adam and Steve (or Eve and Evita) can just as readily raise a healthy child as Adam and Eve. Implicitly, there is nothing unique or special that a child needs to get from his or her mother or father.

But the social science research does not support Walker's warped conclusions. The fact is that traditional man-woman marriage is an important social good associated with an impressive broad array of positive outcomes for children. See William J. Doherty, et. al., 2002. "Why Marriage Matters: Twenty-One Conclusions from the Social Sciences" (New York: Institute for American Values). All the studies show that children do better with both a mother and a father. Neither is expendable in the family equation. The long term commitments of marriage bring stability to children and marriage is the means by which children are nurtured and socialized to become contributing members of

society. It is well documented that children from intact mom-dad marriages have significantly lower incidents of premarital sex, underage drinking, school expulsion, shoplifting, fighting, suicidal feelings and other negative behaviors. Walker is dead wrong. Proposition 8 was not about religion imposing outdated notions on everyone. It was actually about protecting what is best for everyone — the common good.

In support of his radical world view he foists upon us, Walker willingly enlisted the aid of a myriad of plaintiff's Harvard and Yale-educated elitist scholar "expert" witnesses, many of whom themselves are radical homosexual activists with obvious axes to grind. Predictably, Walker failed to even consider whether the personal beliefs or biases of these activist "experts" could undermine their credibility. And while criticizing Proposition 8 proponents' experts for not basing their expert opinions on facts and data, he buys wholesale the opinions of plaintiff's experts without referencing the actual facts or data which purportedly support their opinions. Not surprisingly, Walker found these experts credible and reliable, while he found none of the testimony of the proponents' experts valid.

However, Walker is not just biased on the facts, his opinion clearly also demonstrates that he is incapable or unwilling to follow the U.S. Constitution or case precedent related to the Due Process Clause or the Equal Protection Clause of the 14th Amendment.

Walker shamelessly tortures the Due Process Clause and existing precedent. The Due Process Clause of the 14th Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." To determine whether a right is fundamental and therefore constitutionally protected, the court must inquire into whether the right is rooted "in our Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 US 702, 710 (1997). Under this standard, while the courts have repeatedly recognized traditional heterosexual marriage as a fundamental right, same-sex "marriage" has not. That is because same-sex "marriage" is clearly not a right, which by any means is rooted in "our Nation's history, legal traditions and practices." However for Walker, as for all activist judges, the Constitution and court precedent dare not

constrict a creative jurist who is busy legislating from the bench. Employing raw verbal trickery, Walker by judicial fiat declares that what gays and lesbians are really seeking is "marriage," not gay marriage; therefore, according to his tortured logic, they are merely seeking an existing fundamental right protected by the Constitution.

Walker also ignores well-established Equal Protection Clause precedent to meet his legal goals. After boldly announcing that all distinctions between men and women are magically erased, he concludes that "Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, as excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest." What?

The Equal Protection Clause of the 14th Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." When a law creates a classification but neither targets a suspect class nor burdens a fundamental right, the court presumes the law is valid and will uphold it as long as it is rationally related to some legitimate government interest. See *Heller v. Doe*, 509 US 312, 319-320 (1993).

This is exactly what Proposition 8 did and therefore should have been presumed valid by Walker. Proposition 8 targets no suspect class. Sexual orientation is not a suspect class and has never been legally recognized as a suspect class, whereas race, ethnicity and religion have been. And creatively throwing "gender" discrimination into the mix does not magically transform man-woman only marriage into a suspect classification. Nor did California's constitutional amendment burden a fundamental right since, as discussed above, there is no fundamental right to same-sex "marriage." Finally, as is further discussed below, Proposition 8 is "rationally related" to the legitimate state interest of promoting marriage and protecting children for the common good.

Walker's opinion is a result looking for a rationale. However, the result, same-sex "marriage," finds no support in the facts or the law. The traditional family is the basic foundation for all healthy societies and is the best means by which we can safeguard our future by caring for the next generation. The undeniable fact remains that families with both moms and dads serve the common good of society. Notwithstanding Walker's desire to the contrary, it is a scientific fact that opposite sex couples are superior to same-sex couples when it comes to the commitments of marriage and family matters. As a Nation, we ignore this truth to our peril.



Dean R. Broyles is president and chief counsel for The Western Center for Law & Policy.

The Elephant in the Room

By Timothy Tosta

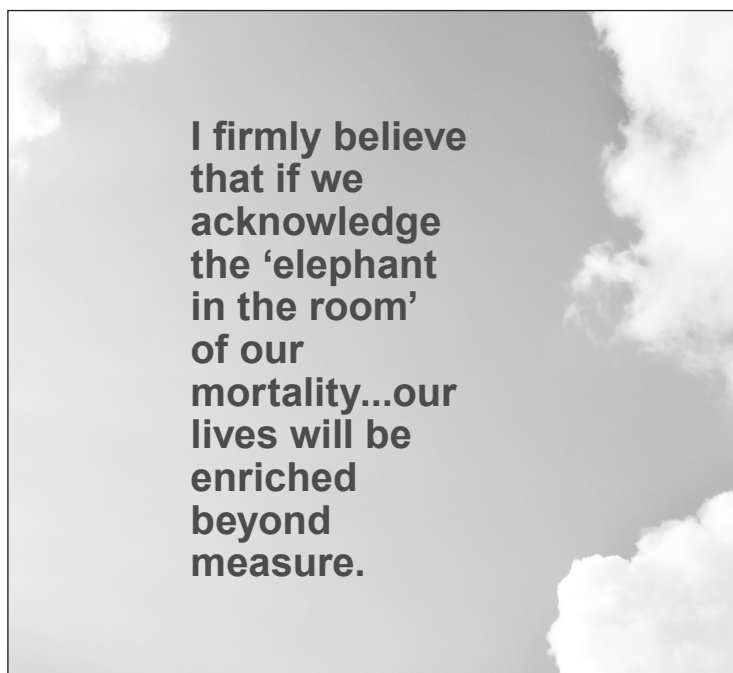
It had been a little over three years since I had spent any meaningful time with Peter. We left message snippets for one another on Facebook, exchanged occasional e-mails and had short telephone conversations in which we agreed to reconnect as soon as we found the time, which we never did.

Peter had come in as a lateral litigation partner at the firm, which I had joined the previous year. Although he was in Los Angeles, my client work in Los Angeles and his in San Francisco got us together frequently in the five or so years we were partners.

About a month ago on a Saturday afternoon, Peter was out of state, working out at the hotel gym, when he suffered a massive heart attack. He lost 80 percent of his heart function in that episode. By the time he arrived at the hospital, there were signs that he also had lost significant brain activity. By the following day, it was clear that if Peter were to survive, his quality of life would be severely compromised. By Monday,

testing confirmed that his brain had ceased to function.

His family gathered from different parts of the country and a decision was made to remove him from life support on Wednesday. Peter was surrounded by family, and a couple of close friends, as he passed to the strains of the Grateful Dead.



A few years before, I had counseled Peter on what he could expect in the last months of the life of his lovely and caring wife, Carol, who was in the end stages of metastatic breast cancer. My job in supporting Peter was twofold. First, I tried to help Peter find a way to be truly present with Carol, despite his own fears and in the face of monumental pain that Carol would likely experience from a cancer that had metastasized to her spine. Second, I wanted to transmit to him some of the lessons that I had learned, in my then limited experience as a hospice volunteer, on how to truly listen to Carol — to "hear" below the words and to discover where best to offer his support.

I'm now in my seventh year as a hospice volunteer. The years of additional practice have deepened not only my respect for the extraordinary process that dying is, but have revealed to me lessons from the end of the life process itself. I firmly believe that if we acknowledge the "elephant in the room" of our mortality, appreciate the gift of each and every day as it transpires, and live in generosity and kindness, our lives will be enriched beyond measure. We will learn to care for ourselves in order to better care for others. From that, others are drawn toward you. Your gifts of service are more than amply repaid.

That all sounds pretty "highfalutin," but it's horribly practical. I speak from my own experience. From the time that I was given my two year prognosis from a misdiagnosed melanoma, I have lived very well with my mortality. In the almost 20 intervening years, I have found my life's purpose. I have found more love and joy than I imagined possible. In my career, I have attracted better work, (even in these trying times), and a more thoughtful, resourceful and creative clientele.

I would like to highlight the lessons that I have drawn, thus far, from my

work with the dying and to encourage you to consider these issues now, because your death is a certainty. It will come to you whether or not you are prepared. And at your death, your wealth, power, and loved ones cannot help you. Truly living your life will prove your best preparation for death.

Here are the lessons:

Death teaches you to live in profound change and to accept it's inevitability.

Death teaches you to surrender what you cannot control and to flourish in the abundance of what remains.

Death teaches you to abandon those perceptions that don't serve you.

Death teaches you to discover the beauty and meaning of the universe.

Death teaches you to see your inherent goodness and inextinguishable relation to others.

As those residents for whom I care address these lessons, they engage in two processes. The first is an assessment of their particular life's meaning, conducted in a process of life review and reinterpretation. The second is a process of offering and receiving forgiveness, based on what that review has revealed.

From the extraordinary things I have witnessed, I have come to the conclusion that every life has meaning. It may be great or humble, but it is there. And, as I have witnessed, you can find meaning until your final breath. Your life's meaning arises from you and how you hold your life. It is not given to you by others.

One of the reasons that I encourage you to explore these issues now is that you immediately begin to relieve your suffering. Through my hospice work, I have learned how to see suffering and to empathize with it. Empathy allows my compassion to arise and makes me available to serve others without the imposition of my fears, my personality or my mental obstructions.

There is a downside to gaining these insights. I simply cannot discharge them at the end of my hospice shift. I go back to the rest of the world carrying them with me. As strange as it may seem, I can sit with someone and know within a relatively short period of time how that person's life might end, if no further self work is done. I feel their struggles. I witness their pain.

The upside is that I can bring that knowledge into my work as a lawyer, using my perspective on the end of life to relieve the suffering from a dispute or engagement, supplanting it with collaboration and creativity, where possible.

Peter was bigger than life itself. He engaged life enthusiastically. He welcomed everyone to the party of his existence. Peter was very self aware. Like most of us, he had a demon or two. But, I believe that when he passed, his important work was done. That's why he could leave so quickly.



Timothy Tosta is a partner with Luce Forward's San Francisco office, specializing in land use law. He also is the author of "#DEATHtweet — A Well Lived Life Through 140 Perspectives on Death and Its Teachings," published by Happy About Books. He blogs at www.coachingcounsel.com/blog. He can be contacted at (415) 356-4612 or ttosta@luce.com.

Daily Journal

<p>Charles T. Munger Chairman of the Board J.P. Guerin Vice Chairman of the Board</p>	<p>Gerald L. Salzman Publisher / Editor-in-Chief Robert E. Work Publisher (1950-1986)</p>
<p>David Houston Editor</p>	
<p>Alexia Garamfalvi San Francisco Editor</p>	<p>Sharon Liang Legal Editor</p>
<p>Liz Enochs Associate Editor San Francisco</p>	<p>Pia Sarkar Associate Editor San Francisco</p>
<p>Evan George Associate Editor Los Angeles</p>	<p>Michael Gottlieb Associate Editor Los Angeles</p>
<p>Evelyn Larrubia Associate Editor Los Angeles</p>	
<p>Aris Davoudian, Designer</p>	
<p>Los Angeles Staff Writers Pat Alston, Gabe Friedman, Emma Gallegos, Kari Hamanaka, Catherine Ho, Ciaran McEvoy, Susan McRae, Brandon Ortiz, Jean-Luc Renault, Anna Scott</p>	
<p>San Francisco Staff Writers Rebecca Beyer, Laura Ernde, Sara Randazzo, Jill Redhage, John Roemer, Fiona Smith, Amy Yarbrough</p>	
<p>Bureau Staff Writers Craig Anderson, San Jose, Jason W. Armstrong, Riverside, Don J. DeBenedictis, Santa Ana, Pat Broderick, Mandy Jackson, San Diego, Lawrence Hurley, Washington D.C.</p>	
<p>Robert Levins, S. Todd Rogers, Photographers Lisa Kestenbaum, Carla Pineda Editorial Assistants</p>	
<p>Rulings Service Seena Nikravan, Rulings Editor Meryl Chambers, Verdicts and Settlements Editor Karen Natividad, Genevieve Knolle Legal Writers</p>	
<p>Advertising Audrey L. Miller, Corporate Display Advertising Director Monica Smith, Los Angeles Account Manager Joel Hale, Michelle Kenyon, San Francisco Account Managers Kari Santos, Display Advertising Coordinator Audrey Wood, San Francisco Administrative Coordinator</p>	
<p>Art Department Kathy Cullen, Art Director</p>	
<p><small>The Daily Journal is a member of the Newspaper Association of America, California Newspaper Publishers Association, National Newspaper Association and Associated Press</small></p>	