

Prop. 8 ruling ignores precedent, evidence and common sense

**By Edwin Meese III
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Even some who support same-sex marriage worry that, in striking down California's voter-approved proposition defining marriage as between one man and one woman, U.S. District Judge Vaughn Walker went too far. They are right -- and not the only ones who should be concerned. Walker's ruling is indefensible as a matter of law wholly apart from its result.

By refusing to acknowledge binding Supreme Court precedent, substantial evidence produced at trial that was contrary to the holding and plain common sense, the ruling exhibits none of the requirements of a traditional decision. This opinion is arbitrary and capricious, and its alarming legal methodology and overtly policy-driven tenor are too extreme to stand.

Regardless of whether one agrees with the result, structurally sound opinions always confront binding legal precedent. Walker's is a clear exception because the U.S. Supreme Court has spoken on whether a state's refusal to authorize same-sex marriage violates the equal protection and due process clauses of the 14th Amendment. In 1972, *Baker v. Nelson*, a case over whether Minnesota violated the Constitution by issuing marriage licenses only to opposite-sex couples, was unanimously thrown out on the merits, for lack of a substantial federal question. The Supreme Court's action establishes a binding precedent in favor of Proposition 8. But Judge Walker's ruling doesn't mention Baker, much less attempt to distinguish it or accept its findings.

During a trial, litigants from both sides introduce various types of evidence, including witness testimony, documentary evidence and legal opinions that involve "judicial notice" of certain well-known or legally controlling facts. Sound judicial opinions consider the facts and evidence on both sides of an argument, apply them fairly to the dispute at hand and determine which legal cases are on point.

Yet Walker's opinion pretends that the voluminous evidence introduced on the side of Proposition 8 does not exist. It neither acknowledges nor attempts to distinguish the writings of renowned scholars presented at trial in support of Proposition 8, including that of anthropologist Claude Levi-Strauss, history professor Robina Quale and social scientist Kingsley Davis. It ignores the writings of legal giant William Blackstone and philosophers John Locke and Bertrand Russell. It even refused to address the fact that Congress, in the 1996 Defense of Marriage Act, defined marriage as the "legal union between one man and one woman as husband and wife."

Despite ample evidence introduced into the record that only a union of a man and woman can produce offspring (as if that needs proof), Walker's opinion denied the relevance of that biological fact. That difference has been the main reason civilization recognized the uniqueness of marriage as between a man and woman, and why courts have repeatedly relied on that common-sense truth.

Despite voluminous evidence and common sense pointing to the contrary, the judge also declared that opposite sexes were never part of the "historical core of the institution of marriage"; "evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different than opposite-sex couples"; traditional marriage is an "artifact"; and, also without reference to the monumental evidence to the contrary, that it is beyond "any doubt that parents' genders are irrelevant to children's developmental outcomes."

These assertions appear in the [opinion's "findings of fact" section](#), yet they are not facts.

These "findings" derive from arbitrary and capricious non-analysis and are forcefully contradicted by evidence in the court record. No appellate court should allow the ruling to stand.

Having ignored everything courts typically rely on in making sound judgments, Walker concluded that Proposition 8 was enacted "without reason" and demonstrates "a private moral view that same-sex couples are inferior to opposite-sex couples [and are] . . . not as good as opposite-sex couples." Nothing in Proposition 8 supports such conclusions, particularly since California law grants same-sex couples all the benefits and protections that apply in traditional marriage.

People can differ on whether, as a matter of policy, states should allow same-sex marriage. The robust debate on that topic should not be short-circuited by judicial fiat.

Yet, according to the federal district court, Americans such as President Obama, Vice President Biden, Secretary of State Hillary Clinton, the majority of members of Congress and the 7 million Californians who voted for Proposition 8 are all bigots who have "no rational reason" to oppose gay marriage.

Even the usually liberal U.S. Court of Appeals for the 9th Circuit has reservations about immediately implementing Walker's exercise in judicial social engineering. A three-judge panel of the court [issued a stay late Monday](#) to prevent California's law from being cast aside before a panel can fully review the matter. It was right to do so. The rule of law demands more careful consideration of this important issue than Walker's decision delivered.

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