

The Rev. Canon Susan Russell, Chair of the Bishop's Program Group on LGBT Ministry wrote this excellent summary on the recent Prop 8 decision. It contains FAQs and great talking points on the recent decision and on same sex marriage as well.



The [landmark ruling](#) by Judge Vaughn Walker issued on August 4, 2010 in Perry vs. Schwarzenegger will continue to have broad ranging impact and to be in the news and in conversations for the foreseeable future. Here are a few Q&A's – some from actual conversations I've had since August 4th and some from imagined conversations I'd like to have with some of the Letters to the Editors writers, bloggers and talk show pundits. See what you think. And if you're getting questions you'd like answers for ... or if you've got your own list of FAQ&As then send 'em on over! The more the merrier!

“What did Judge Walker actually rule?”

He ruled that the plaintiffs – the two couples who sued the State of California in Perry vs. Schwarzenegger -- were correct in their contention that Proposition 8 was unconstitutional. From the decision:

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.

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.

So here are some questions:

“How can one judge overrule the votes of 7 million people? Isn't this what they call 'judicial activism?'”

- Equal protection is a core value of a nation that pledges “liberty and justice to all” – not just some. The 14th Amendment to the Constitution guarantees “equal protection” to all American citizens. That means a majority of citizens cannot take away constitutional rights from a minority.
 - The Supreme Court decided decades ago that the right to marriage is a fundamental right in *Loving vs. Virginia* -- finding bans on interracial marriage unconstitutional.
 - In *Perry vs. Schwarzenegger*, Judge Walker ruled that 52% of the population (the percentage that voted for Prop 8 in California) did not have the right to take away the fundamental right to marriage from same-sex couples.
 - As for “judicial activism,” Prop 8 attorney Ted Olson has rightly noted that judicial activism is another term for a decision you don’t like.
 - Another court “overruled the will of the people” in *District of Columbia vs. Heller* when it held that the people did not have the right to vote to take away 2nd Amendment rights by enacting gun control. We didn’t see conservative pundits talking about “judicial activism” in that ruling. You can’t have it both ways.
- Bottom line: Equal protection means equal protection. Even when it’s equally protecting people you don’t like or agree with.

“I don’t care what the courts say. The Bible says marriage is between one man and one woman and that’s what I believe.”

- Another key constitutional protection is in the 1st Amendment: freedom of religion. Your right to believe whatever you want about what the Bible says about anything – including marriage – is absolutely protected. So is the right of clergy people to make decisions about who they will or will not marry based on their own conscience and the dictates of their own religion.
- What is NOT protected is your right to write your theology into our Constitution. Nobody has that. And nobody should.
- Imagine if 52% of the voters in California were “traditional values” Muslims who believed that only sharia marriage (marriage that complies with their reading of Muslim religious law) was valid or recognized in the State of California. Wouldn’t the 14th Amendment come in pretty handy at that point? Wouldn’t you want your rights to be protected from somebody else’s theology?

Bottom line: Good people of deep faith are going to come to different conclusions about what the Bible says about many things. This is one of them. But the issue on the table is not who's right about questions of faith. It's who is entitled to equal protection by the Constitution when it comes to civil marriage. And the Walker ruling makes it clear that same-sex couples have that protection.

“I’ve heard that this decision will infringe on freedom of religion. Shouldn’t clergy be able to decide who they will or won’t marry without having to worry about getting sued?”

- Of course they should and they do. The 1st Amendment protects that right. Any suggestions that this decision will change those protections are completely baseless.
- For example, in the State of California we have had no-fault divorce since the 1970's and divorced couples routinely re-marry and receive the protections afforded by civil marriage. However, a Roman Catholic couple cannot compel their priest to give them their church's blessing on that marriage because it's contrary to their theological practice.
- Likewise, interfaith marriages happen all the time but a rabbi cannot be compelled to preside at an interfaith wedding if it violates his or her religious conscience.
- It is exactly the same with same-sex marriages.

Bottom line: Some clergy will decide to preside at same-sex marriages and others will not. Nothing will change for those who choose not to marry same sex couples. However, those clergy whose religious conscience calls them to offer equal blessing to all couples coming to them for marriage will now be able to also offer the equal protection civil marriage gives the opposite sex couples they marry to the same sex couples they bless.

“You can give them equal rights if you want to why do you have to call it marriage? Why aren’t civil unions good enough for them?”

- Because Brown vs. Board of Education firmly established that separate is inherently unequal.
- Giving opposite sex couples the legal protections and cultural standing of marriage and offering equally protected same sex couples civil unions or domestic partnerships is inherently unjust, unequal and unfair.
- And until we overturn DOMA (the “Defense of Marriage Act”) at the federal level, no matter what we do at the state level opposite sex couples automatically receive [1138 federally protected rights](#) that same sex couples are denied.

Bottom line: Separate-but-equal isn't. Period.

“I’ve heard the Judge Walker is gay. How can a gay man make a fair decision on an issue like this that could potentially impact him personally?”

- Judges are trained to rule based on the finding of facts and on the law.
- By that reasoning African American judges shouldn't rule on any case involving the civil rights of African American citizens, women judges shouldn't rule on issues involving a woman's right to choose and Hispanic/Latino judges should certainly not be hearing any immigration cases.
- And – it could be argued – judges in opposite sex marriages should recuse themselves from decisions involving marriage equality because they'd be unable to make a fair decision in a case about marriage.

Bottom line: If you're resorting to attacking the sexual orientation, gender, ethnicity, race, creed, marital status or any other personal characteristic of the judge it's because you've run out of facts and law to argue. It's a tribute to the strength of the ruling that the opponents of marriage equality are sinking this low.

“So what happens next?”

- The Ninth Circuit Court of Appeals put same-sex weddings in California on hold, while it considers the constitutionality of Proposition 8.
- The appeals court's order trumps District Vaughn Walker's ruling that would have allowed county clerks to begin issuing marriage licenses to same-sex couples on August 18th.
- The court also asked specifically that Proposition 8 supporters address whether they have "standing," the right to appeal to the court without a state official. (California's governor and attorney general have both declined to appeal the decision.)
- The court will hear the appeal on December 6, 2010.

Bottom line: The arc of the history is long but it bends toward justice.