

CALIFORNIA GAYS SEEK MARRIAGE RIGHTS UNDER U.S. CONSTITUTION

By Nick Gier, Professor Emeritus, University of Idaho
(nickgier@roadrunner.com)

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I cannot think of a single reason—and have not heard one since I undertook this venture—for continued discrimination against decent, hardworking members of our society on that basis.

--Theodore Olson, George W. Bush's Solicitor General

Seven state courts, one with a majority GOP appointees, have ruled that denying the right to marry for gays and lesbians violates their constitutions. The New Jersey Supreme Court concluded that "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our state Constitution."

Writing for the majority in the Massachusetts Supreme Court, Chief Justice Margaret Marshall, a GOP appointee, stated that her state's Constitution "forbids the creation of second class citizens," and "the right to marry means little if it does not include the right to marry and the person of one's choice."

A trial in San Francisco will now decide whether this denial violates the equal protection clause of the 14th Amendment of the U.S. Constitution. It is worth stating this clause in full: "No state shall deprive any person of

life, liberty or property, without due process of law; nor deny to any person the equal protection of the laws."

Referenda or legislation in 31 states have denied marriage rights to gays and lesbians, and let's hope that the Judge Vaughn Walker, appointed by President Bush the Elder, decides that majority rule cannot mean that any minority's rights--be they of a different race, religion, or sexual orientation--can be trampled. There is substantial evidence that one does not choose one's sexual orientation in more than one chooses one's skin color.

The most interesting aspect of the San Francisco trial is that Ted Olson, former Solicitor General for George W. Bush, is representing the gay couples who have challenged the constitutionality of California's Proposition 8, the ballot measure that has now made same sex marriage illegal. The great irony is that the marriages of 18,000 gay and lesbian couples, performed after the California Supreme ruled that banning same-sex marriage was unconstitutional, are still legal.

In a column in *Newsweek* (Jan. 18) Olson waxes eloquent in his defense of gay marriage: "Same-sex unions promote the values conservatives prize. Marriage is one of the basic building blocks of our neighborhoods and our nation. At its best, it is a stable bond between two individuals who work to create a loving household and a social and economic partnership. . . . It transforms two individuals into a union based on shared aspirations, and in doing so establishes a formal investment in the well-being of society."

Charles Cooper, the attorney defending Proposition 8, has trotted all the same old reasons that have been refuted time and time again. Cooper argued that we should respect the tradition that only a man and woman can marry, but Olson countered that “simply because something has always been done a certain way does not mean that it must always remain that way. Otherwise we would still have segregated schools and debtors' prisons.”

Tradition once held that people of color were inferior beings and that it was both a sin and a crime for people of different races to marry. Today people, almost without exception, find this idea absurd. It is amazing to think that it was illegal for couples of different races to marry as recent as 43 years ago. I'm sure we will have the same response looking back at the controversy about gay marriage.

Opponents also allege that gays and lesbians perform “unnatural” sex acts and therefore their rights should be restricted. Heterosexual couples, however, indulge in far more unnatural sex acts than their homosexual compatriots, but no one would propose taking their marriage licenses away. People in liberal democracies don't lose their rights by being immoral or even by performing unnatural acts. If that were true, then millions of sexually active heterosexuals would suddenly not be able to make medical decisions for their spouses, receive Social Security after the spouse's death, or adopt children.

My favorite story about the immorality argument came in a debate between a gay man and a conservative pastor on a Boise TV station. The preacher told his debating partner that he loved him as a human being, but he

hated what he did in his bedroom. The gay man's reply was perfect: "How do you know what I do in my bedroom?"

When two Texas men were caught by police having sex in their bedroom, they were fined \$200 each under that state's sodomy laws. (Incredibly enough, it was not a crime for heterosexuals to engage in the exact same act.) In 2003 the men appealed to the Supreme Court, where in *Lawrence v. Texas* the justices ruled 6-3 in their favor.

Writing for the minority and assuming that he could deny gays and lesbians rights because their acts are "immoral and unacceptable," Justice Antonin Scalia conceded that if the majority prevailed: "What justification could there possibly be for denying the benefits of marriage to homosexual couples exercising the liberty protected by the Constitution?"

In an exchange with Judge Walker during arguments for summary judgment, defense attorney Charles Cooper said that he wished that Scalia had not written that dissent. Walker and Olson joined Cooper in their mutual admiration for Justice Scalia, but Dan Levine at Law.com observes that Cooper now has to disagree with Scalia's reasoning that "the *Lawrence* majority had opened the door to gay marriage."

Olson is making mince meat of Cooper's invalid argument that marriage should be limited to a man and a woman because the state has an interest in promoting procreation. As Olson states: "This procreation argument cannot be taken seriously. We do not inquire whether heterosexual couples intend to bear children, or have the capacity to have children, before

we allow them to marry. We permit marriage by the elderly, by prison inmates, and by persons who have no intention of having children.”

Olson is proud to point out that the lesbian couple he’s representing is raising four children. Studies have shown that children suffer no ill effects living in same-sex households. This is the position of the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, the American Academy of Pediatrics, and the Evan B. Donaldson Adoption Institute.

Judge Walker, who is considered “an independently minded conservative,” also caught Cooper off guard when he told him that he had recently married a man who was 95 to a 83-year-old woman and that he “did not demand that they prove they intended to engage in procreation.” Cooper quietly demurred when the judge asked him if he should have denied the couple the right to marry.

Judge Walker also asked Cooper if he “could provide proof that same-sex marriages harm society.” Cooper conceded that he could not provide any. “Does that mean if it's not rational basis review, you lose?” Walker asked. Cooper answered “No.” The judge disagreed and hinted that Cooper does not have a legal leg on which to stand.

Everyone agrees that this case will go all the way to the Supreme Court. Let us hope that Scalia honors the legal precedent of *Lawrence v. Texas*, which prevents him arguing that gays and lesbians cannot marry because they engage in illegal activity. Let us also hope that his razor sharp reasoning forces him to be logically and legally consistent on this point.

Celebrating the end of Texas' sodomy law, Ellen Goodman said: "The statutes that made homosexuals outlaws had to end before they could become in-laws." But wait a minute: even heterosexual criminals in prison are allowed to marry the heterosexual of their choice!

Nick Gier taught philosophy at the University of Idaho for 31 years. Read all of his columns on civil rights at www.home.roadrunner.com/~nickgier/CivilRights.htm