

The Legal Circus That Killed Proposition 8

by Frank Schubert

When I was a kid, my brother and I would occasionally go to the Memorial Auditorium in downtown Sacramento and watch the spectacle that was then called "Big Time Wrestling." It featured all kinds of amazing characters with different story lines. The matches always involved someone who represented the "good guy" against an adversary who embodied the "bad guy."

People cheered and jeered every move in the ring. The bad guys won a lot of the time, usually using nefarious tactics like low blows, sleeper holds, and brass knuckles, always in front of the crowd but invariably when the referee had his back turned, distracted by some ruse or other. People would be furious when the good guy lost, but they knew that as surely as night follows day, soon enough there would be a rematch where, against all odds, the good guy would mount an incredible comeback and destroy the forces of evil right there in the ring. And secure in the knowledge of the rematch, all in the universe of teenage boys would return to normal.

The legal wrangling over Proposition 8 has reminded me of a Big Time Wrestling match. It's something I've followed with more than a passing interest, since I managed the campaign that enacted the constitutional amendment. Watching Prop 8 career through the federal court system left me feeling frustrated and sometimes incensed that the system itself seemed so staged, and appeared to be so corrupt.

But I felt, like I did as a kid, that somehow, some way the initiative adopted by over seven million California voters would escape the grasp of slick-talking lawyers and self-interested judges and politicians and emerge victorious—living

to fight another day. A rematch, if you will. Alas, it now sadly appears that absent some last minute legal ruling this initiative—and with it a good chunk of the initiative process itself—is dead.

Regardless of whether you see voters defining marriage as the union of one man and one woman as the “good guy” or the “bad guy” in this political drama, the process that killed marriage in California should greatly concern anyone who cares even remotely about democracy and the rule of law.

Judges, Politicians, and Prop 8 Opponents Ignored the Rules

The Prop 8 challenge landed in the San Francisco federal courtroom of Vaughn Walker. We’re supposed to accept that this happened randomly, and that the plaintiffs weren’t tipped off by someone in the court system to file the case at a particular time when Judge Walker happened to be the one who’d get it.

Whether by accident or grand design, it was a fortunate assignment for the plaintiffs. Walker was a judge in a long-term committed relationship with another man—in other words, he was in exactly the type of relationship as the plaintiffs who were bringing suit. Walker never disclosed this critical fact to Prop 8 supporters, or to the public, despite judicial rules requiring such disclosure if even the *appearance* of impropriety was present.

Imagine if a judge heard a lawsuit by tomato farmers against an environmental law, but refused to disclose that he was also a tomato farmer. The media and environmentalists would scream to the heavens about the potential for bias. Yet, because the issue in this case was same-sex marriage, Walker got away with the low blow.

While the lawsuit stood before a hometown judge, state officials did everything in their power to throw the case. Both then-Governor Arnold Schwarzenegger and then-Attorney

General Jerry Brown refused to defend the law enacted by the people of California, despite their sworn oath of office to do so. The current Attorney General, Kamala Harris, dutifully took the same course.

Of course, the constitution of California does not give to the governor or the attorney general the power to decide for themselves which laws are constitutional and which are not, nor are they free to determine which laws shall be defended and which shall be abandoned. But no matter.

Having orphaned Prop 8, leaving it and the seven million citizens who enacted it defenseless in court, it fell to the backers of the initiative to defend the law in the federal courts. This not only cost the supporters of Prop 8 over \$10 million in legal expenses; it ultimately put a sleeper hold on the initiative.

Imagine that, in our tomato farmer case challenging state environmental laws, neither the governor nor the attorney general would defend the environmental law, and the lawsuit went undefended. What howls of protests we'd hear from the left! I can even imagine hearing demands for recalls in such a circumstance. Yet because the issue in this case was same-sex marriage, Schwarzenegger, Brown and Harris all got away with it.

Time and again during the trial Walker issued rulings widely favoring the challengers of Prop 8. Twice his rulings were overturned through emergency appeals—once by the US Supreme Court on the eve of trial—something that is virtually unheard of at the district court level. To nobody's surprise, Walker ruled that Prop 8—which reflected a point of view on the definition of marriage that until five years before its adoption had been held in every single state in the nation, and virtually every other country since the dawn of time—violated the Fourteenth Amendment and was thus illegal under the US Constitution.

Next the case headed to the Ninth Circuit Court of Appeals, where it became the province of a panel including Stephen Reinhardt, senior judge of the circuit and widely considered to be one of the most liberal (and most overturned) judges in America. I frankly never expected much relief out of what many conservatives ruefully refer to as the "Ninth Circus." But even I was surprised by the chicanery involved in Reinhardt's handling of the case.

It turns out that his wife, an attorney with the ACLU, had advised the plaintiffs' lawyers on strategy before this very case was even filed! Reinhardt refused to recuse himself from deciding the case his wife had participated in, and went on to write a majority opinion finding that Prop 8 was unconstitutional. But not even Stephen Reinhardt could go along with the reasoning of Judge Walker; instead he invented a whole new legal rationale to get the result he—and his wife—so badly wanted.

Before Reinhardt could invalidate Prop 8, he had to deal with the thorny legal issue of "standing"—that is, did the proponents of Prop 8 have the legal right to bring the appeal, or is that something that only state officials can do? Since the governor and attorney general had refused to fulfill their obligation to defend the law, it was the proponents of the initiative bringing the appeal.

Reinhardt felt that the issue of standing rested on whether the state courts allowed initiative proponents to represent the interests of the state when elected officials refused to do so. His panel asked the California Supreme Court for advice on the question, and that court answered unanimously that initiative proponents *did* have that right under state law. With this answer in hand, Reinhardt did what we expected him to do and he issued his opinion striking down Prop 8.

Finally, the case was headed to the Supreme Court, but would they take it? Many observers felt that the justices would

decline to take on the politically-charged issue of same-sex marriage. Yet they not only took the Prop 8 case, they took a case out of New York challenging the federal definition of marriage. I felt elated when the announcement came that review had been granted—thinking that they'd only take the case if they were going to reverse the Ninth Circuit. Otherwise, I reasoned, they could just dodge the issue by not granting review.

It's impossible to describe the amount of work that the Prop 8 legal team did in representing the people of California before the Supreme Court. They did a phenomenal job. I thought the issue was incredibly well briefed, and superbly argued by lead attorney Chuck Cooper. After the oral argument, I was confident that we would win on the merits.

The oral argument also convinced me that the Court was likely to invalidate the federal definition of marriage in Section 3 of DOMA using a theory of federalism—that states had the right to define marriage as they wished, and that federal law must follow the states' definitions. This only strengthened my view that Prop 8 would be upheld on the rationale that if New York had the right to redefine marriage, then surely California had the same right to go in the other direction.

I have to admit to extreme disappointment and more than a little bitterness when I read the decisions in the two cases. The Court invalidated the federal law and then refused to decide the merits of Prop 8's constitutionality, instead punting and using "standing" as their way out.

The Cheaters Won

It's only natural for people to want to know how I feel about the outcome, not only from a policy perspective but also from a personal perspective. After all, I put my heart into managing (and winning) the Prop 8 campaign in 2008, and since then have spent much of my professional career working on

preserving marriage throughout the nation.

Here's how I feel.

I feel like we were cheated. Just like I felt as a kid watching the bad guy put a sleeper hold on his opponent, or hitting him below the belt or with the brass knuckles while the referee had his back turned, so have the legal system and politicians cold-cocked the people of California—seven million of whom went to the polls to lawfully enact Prop 8. Only this time, I realize there's not likely to be a rematch. The cheaters won.

I feel like the rule of law has been shredded, and conniving politicians have been rewarded for ignoring their sworn oath of office. Public confidence in the judicial system has been dealt a severe blow. Supporters of same-sex "marriage" may be happy with the result today, but hold on until the tables are turned and a conservative governor and attorney general refuse to defend a law they don't personally support, and there's nobody left with standing to defend it. The seeds of that action will have been sown by leftist politicians like Brown, Harris, and Schwarzenegger.

I feel like a broadside has ripped a great hole in the initiative and referendum process itself. I have managed nearly forty statewide ballot initiative campaigns in my career. The initiative process is one of the few viable ways to get a recalcitrant government to respond to legitimate issues that are not being addressed by the legislature or the state administration. By its nature, citizens are often pushing a law that is opposed by those in power.

Now those very people in power—the governor and attorney general—have been given a pocket veto over the initiative process itself. They can invalidate any measure they don't personally support simply by refusing to defend it in federal court. Such power was never contemplated by the framers of the

constitution, or by the people of California, but that is the practical result of the Supreme Court's ruling on Prop 8. Again—it is marriage today, but tomorrow it could be any other issue on the political spectrum.

I feel a measure of sadness for all the people who worked so hard for something they believed so passionately—a belief shared by millions of people. Campaigns are about ideas and laws, certainly, but they involve real people.

So I think about people like Scott Eckern, a distinguished musical producer, who was forced to resign from the California Musical Theater in Sacramento over his \$1,000 contribution in support of Prop 8. I think about Marjorie Christofferson, a then-67-year-old employee at her family-owned Mexican restaurant in Los Angeles, who was forced to take a leave from the business over donating a mere \$100 to our campaign.

I think about the 80,000 people just like them—moms and dads, retirees, students, husbands and wives—who gave generously of their financial resources to allow us to mount a winning campaign. I think about all the pastors, priests, bishops, rabbis, imams, and other religious leaders who put their religious differences aside to work together in support of the eternal truth about marriage—that it is a covenant between one man and one woman, modeled after God's own covenant with us.

And I think about the 250,000 volunteers in our campaign who walked precincts, knocked on doors, and manned phone banks, including Jose Nunez, a proud immigrant and newly sworn-in US citizen, who was physically assaulted by a Prop 8 opponent while waiting to distribute signs outside his Catholic church.

All of these people paid a tremendous price. They, and the voters, deserved better than to be left undefended before the legal system, abandoned by those sworn to defend them, ignored by judges determined to impose a particular result, and then orphaned by the Supreme Court as the great referee pretended

not to see all the nefarious activity going on with the case right in front of them.

The decisions worry me. I am actually less worried about the damage done to the institution of marriage than I am about the damage done to the body politic. Marriage is an eternal truth, and a profound good. Its value to society is inestimable. No government, judge, or politician has the power to change the inherent nature of marriage. In the end, the truth of marriage will prevail, even if the law decides to abandon it for a time.

Democracy, on the other hand, is not nearly so stable. Preserving it depends upon the integrity of our institutions, which are charged with specific functions to serve the interests of the body politic. Legislatures and voters pass laws they believe will benefit society; executives must fairly administer and defend those laws; and courts must impartially interpret the laws. When the votes of millions of people are ignored by the elites in government, when politicians can ignore their oath of office and assume for themselves extra-constitutional authority, when judges can ignore their own internal conflicts and impose their own political views on an issue in direct contravention of the expressed desires of the people, and when the Supreme Court can turn a blind eye to the matter and let the politicians and judges get away with it, public confidence in government is seriously, and perhaps permanently, eroded.

Some of my friends wonder if I regret taking on Prop 8, and my subsequent work in support of marriage, life, and religious liberty. The answer is no, not for a minute. I've never regretted standing for the truth, and I don't regret it now. I'm not worried in the least about any impact on me, and I'll continue to work on behalf of these critical issues. The answer to those who ask how I am doing is simply this: worry not for me, worry for thee.

Frank Schubert is president of Mission Public Affairs, LLC and was Campaign Manager of the successful Proposition 8 campaign in California. He has twice been named the nation's top public affairs professional by the American Association of Political Consultants.

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Will Prop 8 Be Upheld as Law?

ALLIANCE DEFENDING FREEDOM

July 15, 2013 – FOR IMMEDIATE RELEASE

The following quote may be attributed to **Alliance Defending Freedom Senior Counsel Austin R. Nimocks** regarding the decision of the California Supreme Court in *Hollingsworth v. O'Connell* not to issue a stay while the lawsuit seeking clarity for county clerks on Proposition 8 moves forward:

“Everyone on all sides of the marriage debate should agree that the legal process must be followed. Although we would have preferred for the California Supreme Court to issue a stay so that the state's marriage amendment would be respected sooner rather than later, the proponents of Proposition 8 will continue to urge the court to uphold the rule of law. We remain hopeful that the court will recognize that Proposition 8 remains the law of the land in California and that county clerks must continue to enforce it.”

- Pronunciation guide: Nimocks (NIM'-ucks)

Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of people to freely live out their faith.

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What must be done for the future of marriage

By Ryan T. Anderson –

... in the wake of last month's Supreme Court rulings, where does the marriage movement go from here?

Many have been keen to point out that the Supreme Court refused to redefine marriage for the entire nation. The Court refused to manufacture a constitutional "right" to same-sex marriage.

Citizens and their elected representatives remain free to discuss, debate and vote on marriage policy in all 50 states. They still have the right to define marriage in civil law as the union of one man and one woman.

Justice Antonin Scalia's dissent, however, tells us...more

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